RECORD AND BRIEFS

17 586

FILED
OCT 17 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-

In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT APPENDIX

PAUL D. CLEMENT
ERIN E. MURPHY

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

TABLE OF CONTENTS

Appendix A — Notice of Appeal (Aug. 18, 2017) 1a

Appendix B — Order on Plan C235 (August 15, 2017) 3a

Appendix C — Amended Order on Plan C185 (May 2, 2017) 120a

Appendix D — Order Adopting Plan C235 (March 19, 2012) 367a

Appendix E — Advisory from District Court 425a

Appendix F — Constitutional and Statutory Provisions 426a

Appendix G — Attorney General Letters to 2013 Legislature 429a

Appendix H — MALDEF 2013 Legislative Testimony 436a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, *Plaintiffs*, v. STATE OF TEXAS, *et al.*, *Defendants*.	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

DEFENDANTS' NOTICE OF APPEAL

Defendants the State of Texas, Greg Abbott, in his official capacity as Governor, and Rolando B. Pablos, in his official capacity as Secretary of State, hereby provide notice of their appeal to the Supreme Court of the United States of this Court's Order on Plan C235 (Aug. 15, 2017), ECF No. 1535.

The appeal is pursuant to 28 U.S.C. § 1253, which authorizes direct appeals to the Supreme Court of the United States from a three-judge district court's interlocutory injunctive orders. The Court's August 15, 2017 Order contains an injunction preventing the State from using the existing Congressional Districts 27 and 35. *See* ECF No. 1535 at 105 ("In Part VI, the Court concludes that the Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment. These statutory and constitutional violations must be remedied by either the Texas Legislature or this Court.").

Additionally, an interlocutory order that is not expressly labeled as injunctive but nonetheless has the "practical effect" of granting an injunction may be

appealed as an injunctive order. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). This Order also satisfies *Carson's* "practical effect" test because it prevents the State from using the existing Congressional Districts 27 and 35.

Date: August 18, 2017

Respectfully submitted.

/s/ Patrick K. Sweeten

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Litigation

PATRICK K. SWEETEN
Senior Counsel for Civil Litigation

ANGELA V. COLMENERO
Chief, General Litigation Division

MATTHEW H. FREDERICK
Deputy Solicitor General

TODD LAWRENCE DISHER
Special Counsel for Civil Litigation

ADAM N. BITTER
Assistant Attorney General

J. SETH JOHNSON
Assistant Attorney General

ANNE MARIE MACKIN
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-6407
Fax: (512) 474-2697

COUNSEL FOR DEFENDANTS

APPENDIX B

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ORDER ON PLAN C235

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

This Order addresses Plaintiffs' statutory and constitutional claims against Plan C235, enacted by the 83rd Texas Legislature in 2013.

The following Plaintiffs assert claims against Plan C235 in this consolidated case: the Mexican American Legislative Caucus ("MALC"),[1] the NAACP Plaintiffs,[2]

---

[1] MALC is a non-profit Latino legislative caucus established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas. Docket no. 897 ¶ 18. MALC-1 is a list of current MALC members.

[2] The NAACP Plaintiffs include the Texas State Conference of NAACP Branches, an association of local chapters of the NAACP, Howard Jefferson, and Rev. Bill Lawson. Individual Plaintiff Juanita Wallace passed away in 2016. According to the affidavit of Carmen Watkins, Regional Director for Region VI of the National NAACP, the Texas NAACP has well over 10,000 members and members who are registered to vote in almost every county. NAACP-1. She further

the African-American Congresspersons Plaintiffs,[3] the League of United Latin American Citizens ("LULAC") Plaintiffs,[4] the Rodriguez Plaintiffs,[5] the Quesada

---

attests that "the NAACP has at least one branch in each of the implicated counties," 884 members in Tarrant County, 320 members in Bell County, 1,232 members in Harris County, and 147 members in Fort Bend County. *Id.* She further states that she reviewed the official membership lists in each of those counties and determined that there are members who reside in CD9, CD18, CD30, CD33, and House districts 100, 109, 110, and 111 (Dallas County), 95 and 101 (Tarrant County), 54 and 55 (Bell County), and 26 and 27 (Fort Bend County). *Id.*

[3] Eddie Bernice Johnson (CD30), Sheila Jackson Lee (CD18), and Alexander Green (CD9).

[4] The LULAC Plaintiffs include LULAC and individual members Gabriel Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo H. Tafoya, Raul Villaronga, Asenet T. Armadillo, Elvira Rios, and Patricia Mancha. LULAC has members who are registered to vote in most counties in Texas, including Dallas, Tarrant, Harris, Bexar, Nueces, and Fort Bend Counties. Docket no. 1302-1. LULAC submitted the affidavit of Elia Mendoza, Texas LULAC State Director, who attested that "there are multiple members of LULAC who are eligible voters in each of the Congressional and State Legislative Districts involved in this litigation." *Id.*

[5] Eddie Rodriguez, Milton Gerard Washington, Bruce Elfant, Balakumar Pandian, Alex Serna, Sandra Serna, Betty F. Lopez, David Gonzalez, Beatrice Saloma, Lionor Sorola-Pohlman, Eliza Alvarado, Juanita Valdez-Cox, Jose Martinez, Nina Jo Baker, Travis County, and the City of Austin.

The LULAC Plaintiffs, Perez Plaintiffs, and Rodriguez Plaintiffs have submitted joint briefing as "Joint Plaintiffs" on the congressional plan. Accordingly, the Court will consider their claims together unless necessary to consider them individually. The Perez Plaintiffs include Shannon Perez, Gregory Tamez, Sergio Salinas, Carmen Rodriguez, Nancy Hall, Dorothy DeBose, Jessica Farrar, Wanda F. Roberts, Richard Nguyen Le, and TJ Carson.

Plaintiffs,[6] and Congressman Henry Cuellar.

Plaintiffs assert statutory claims under § 2 of the Voting Rights Act ("VRA") and constitutional claims under the Fourteenth and Fifteenth Amendments to the United States Constitution.

Procedural History and Background

Plaintiffs initially filed several lawsuits in 2011 challenging Plan C185 and Plan H283 enacted by the 82nd Legislature, and the various cases were consolidated. At the time, Texas was subject to preclearance requirements under § 5 of the VRA, and Texas filed a simultaneous action seeking preclearance in the United States District Court for the District of Columbia—*Texas v. United States*, No. 11-1303 (D.D.C).[7] Plaintiffs presented numerous claims in this Court under § 2 of the VRA and the Fourteenth and Fifteenth Amendments, and raised numerous challenges to the plans in the related preclearance litigation in the District of Columbia. The D.C. Court held a trial in January 2012 but had not yet issued a ruling in February 2012.

Faced with impending election deadlines and un-precleared plans that could not be used in the election, this Court was faced with the "unwelcome obligation" of

---

[6] Margarita V. Quesada, Romeo Munoz, Marc Veasey, Jane Hamilton, Lyman King, John Jenkins, Kathleen Maria Shaw, Debbie Allen, Jamaal R. Smith, and Sandra Puente.

[7] Texas could have sought administrative preclearance by the Attorney General, but instead sought a declaratory judgment from the D.C. District Court. In *Texas v. United States*, Texas bore the burden of proving that its enacted plans had neither the effect nor the purpose of abridging minority voting rights. 887 F. Supp. 2d 133, 139 (D.D.C. 2012) (citing 42 U.S.C. § 1973c(a)).

implementing interim plans so that the primaries could proceed. *See* docket no. 690 at 2 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). This Court considered compromise plans (Plan C226 and Plan H303) proposed by certain parties. Although the plans were supported by some parties, including Defendants, most parties contended that they maintained statutory and constitutional infirmities challenged in Plan C185 and Plan H283. The Court adopted Plan C235 (which was Plan C226 as modified for purely technical reasons) and Plan H309, a plan similar to Plan H303 but with changes in Harris County, Bexar County, Webb County, and Nueces County.

This Court found that adoption of these plans as the interim plans for the 2012 elections was consistent with the deferential standards set forth in *Perry v. Perez*, 565 U.S. 388 (2012) and would significantly benefit the voters, candidates, election administrators, counties, and political parties. Docket nos. 690, 691. The Court noted that its analysis had been expedited and curtailed and that it had been able to make only preliminary conclusions that might be revised upon full analysis. Docket no. 690 at 3 ("[W]e emphasize the preliminary nature of this order and that, except for the fact that PLAN H309 sets the districts for the 2012 elections, nothing in this opinion reflects this Court's final determination of any legal or factual matters in this case or the case pending in the D.C. Court."); docket no. 691 at 1 (noting that "this interim map is a result of preliminary determinations" and "is not a final ruling on the merits of any claims").

As directed by the Supreme Court, this Court in adopting an interim map attempted to determine which claims pending in the D.C. Court preclearance litigation

were "not insubstantial" because the D.C. Court had exclusive jurisdiction over the § 5 claims but had not yet ruled. That Court issued its decision denying preclearance of Plan C185 and Plan H283 on August 28, 2012. *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). The panel majority found that Plan C185 increased the "representation gap" from three districts to four districts[8] and thus increased the degree of discrimination and was retrogressive. Because the panel did not agree on the appropriate rationale for finding retrogression, they considered the issue of discriminatory intent and unanimously found that "the plan was enacted with discriminatory purpose." *Id.* at 159. The Court specifically noted that unnecessary changes were made to the three African-American ability districts that raised serious concerns about what motivated the Congressional plan, and that Texas failed to explain the changes as anything other than "coincidence." *Id.* at 159-61.

With regard to Plan H283, the D.C. Court found that it would have the effect of abridging minority voting rights in benchmark ability districts 33, 35, 117, and 149, and that Texas did not create any new ability districts to offset those losses. Accordingly, the plan was retrogressive and could not be precleared.

Having found retrogressive effect, the D.C. Court did not need to reach whether Plan H283 was drawn with a discriminatory purpose, but it did "note record evidence that cause[d] concern." 887 F. Supp. 2d at 177. This

---

[8] Minority representation fell from 10/32 ability districts (when proportionality would be 13/32) to 10/36 ability districts (when proportionality would be 14/36), thus increasing the representation gap from three districts to four.

evidence included that the process for drawing the plan "showed little attention to, training on, or concern for the VRA" and the failure to create any new minority ability districts among 150 relatively small House districts despite the dramatic Hispanic population growth concentrated primarily in three geographic areas. *Id.* at 177-78. The D.C. Court further stated, "These concerns are exacerbated by the evidence we received about the process that led to enacted HD 117," specifically that "mapdrawers modified HD 117 so that it would elect the Anglo-preferred candidate yet would look like a Hispanic ability district on paper," showing "a deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically, the *Hispanic* vote." *Id.* at 178 (emphasis in original).

The D.C. Court also found incredible the testimony of primary House mapdrawer Gerardo Interiano that he was unaware of the capability of Texas's redistricting software (RedAppl) to display racial data at the census block level, which reinforced evidence suggesting that mapdrawers split voter tabulation districts ("VTDs") along racial lines to dilute minority voting power. *Id.* The D.C. Court concluded,

> This and other record evidence may support a finding of discriminatory purpose in enacting the State House Plan. Although we need not reach this issue, at minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental.

Id. Texas appealed the D.C. Court's decision denying preclearance to the Supreme Court.

The Court's interim maps, H309 and C235, were used for elections in 2012. Despite urging from the Texas Attorney General to adopt the Court's interim maps during the regular session in 2013,[9] the Texas Legislature's regular session ended in May 2013 with no redistricting action. However, Governor Rick Perry called a special session directing the Legislature to consider "legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court as the permanent plans for districts used to elect members of the Texas House of Representatives, Texas Senate and United States House of Representatives." D-684.

The Legislature reconvened and undertook this redistricting task. During the special session, some changes were made to Plan H309, and it was adopted as Plan H358. By June 23, 2013, the Legislature had passed SB3 and SB4 to enrollment. SB4 "ratified and adopted" this Court's interim congressional map, Plan C235, without change, and repealed SB4 from the 2011 first special session, which had adopted Plan C185. SB3 adopted Plan H358 as the plan for the Texas House of Representatives and repealed HB150 from the 2011 regular session, which had adopted Plan H283. SB3 and SB4 were sent to the Governor on June 24, 2013.

On June 25, 2013, while Texas's appeal of the D.C. Court's decision was pending, the United States Supreme Court issued its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), holding that the § 4(b) coverage formula of the VRA that determined which jurisdictions

---

[9] *See* Quesada-57 (Attorney General Greg Abbott letter to Speaker Straus urging the Legislature to adopt the interim maps during the session).

were subject to § 5 preclearance was unconstitutional. Accordingly, Texas was no longer automatically subject to preclearance requirements. The Governor signed SB3 and SB4 on June 26, 2013.[10]

On June 27, 2013, the Supreme Court vacated the D.C. Court's judgment and remanded for further consideration in light of its intervening decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and the suggestion of mootness filed by defendant Wendy Davis. *Texas v. United States*, 133 S. Ct. 2885 (June 27, 2013). On remand, the D.C. Court dismissed the preclearance litigation as moot.[11]

On June 28, 2013, Defendants filed a motion to dismiss for lack of subject matter jurisdiction (docket no. 768) in this case, arguing that the case had become moot and should be dismissed. This Court held a status conference on July 1, at which Plaintiffs expressed a desire to amend their complaints to challenge the 2013 plans, and some Plaintiffs stated their intent to amend their existing claims related to the 2011 plans to seek relief under § 3(c) of the VRA.[12] After the hearing, the Court issued an order

---

[10] The 2013 plans for the Texas House and U.S. House became law on September 24, 2013. *See* TEX. CONST. ART. III § 39.

[11] Although the Supreme Court did not rule on § 5 itself, the effect of its ruling was to release Texas from the preclearance requirement and render the D.C. preclearance proceedings moot. On remand, Texas moved to dismiss the case as moot, and the United States did not oppose the motion. Some defendants in the case sought leave to amend to assert counterclaims for relief under § 3(c) of the VRA. On December 3, 2013, the D.C. Court granted Texas's motion to dismiss proceedings in that court and denied the motions to amend.

[12] Section 3(c), known as the VRA's "bail-in" provision, states, "If in any proceeding instituted by the Attorney General or an aggrieved

summarily denying the motion to dismiss for lack of jurisdiction without prejudice (docket no. 771) and issued an order directing Plaintiffs to file motions for leave to amend pleadings.

Plaintiffs filed their motions, and the State responded in opposition and with a motion to dismiss as moot all claims related to the 2011 plans. This Court entered an order on September 6, 2013 on the pending motions (docket no. 886) permitting Plaintiffs to amend their claims with regard to the 2011 plans to assert requests for equitable relief under § 3(c) and to assert claims against the 2013 plans. The Court rejected Defendants' mootness argument, for the reasons explained in that Order and in docket no. 1104. In sum, this Court found that the claims against the 2011 plans C185 and H283 were not moot because Plaintiffs alleged that they were continuing to be harmed by the Legislature's actions in enacting Plan C185 and Plan H283, Texas had refused to concede any of Plaintiffs' claims, and Plaintiffs had alleged claims for which meaningful relief was available. The Court further ordered that the 2013 enacted plans, C235 and H358, be used for the 2014 elections.

Thereafter, Plaintiffs filed their amended complaints. Plaintiffs generally maintained their claims against Plan

---

person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period [may impose preclearance requirements]." 52 U.S.C. § 10302(c) (formerly 42 U.S.C. § 1973a(c)).

C185 and Plan H283 and sought relief under § 3(c) of the VRA. Most Plaintiffs amended their Complaints to assert claims against Plan C235. Specifically, Congressman Cuellar filed a Second Amended Complaint in Intervention (docket no. 893) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; LULAC filed a Third Amended Complaint (docket no. 894) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Rodriguez Plaintiffs filed a Second Amended Complaint (docket no. 896) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Quesada Plaintiffs filed a Third Amended Complaint (docket no. 899) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the NAACP filed a Third Amended Complaint (docket no. 900) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the African-American Congressperson Intervenors filed a Second Amended Complaint (docket no. 901) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Perez Plaintiffs filed a Sixth Amended Complaint (docket no. 960) asserting intentional discrimination claims under § 2 of the VRA and the Constitution; and MALC filed a Third Amended Complaint (docket no. 897) asserting claims under § 2 of the VRA.

Some Plaintiffs also amended their complaints to assert claims against Plan H358: the Task Force filed a Fourth Amended Complaint asserting statutory and constitutional claims based on changes to HD90 from the Court's interim plan (docket no. 891); MALC asserted claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments (docket no. 897); the NAACP

asserted claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments (docket no. 900); and the Perez Plaintiffs filed a Sixth Amended Complaint (docket no. 960) asserting intentional discrimination claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments, and those claims were joined by LULAC.

The Texas Latino Redistricting Task Force and the United States did not assert claims against Plan C235, and the Task Force claims are limited to HD90 in Plan H358. The Texas Democratic Party ("TDP") and Gilberto Hinojosa filed a First Amended Cross-claim (docket no. 902) to assert partisan gerrymandering claims under the Equal Protection Clause and the First Amendment against the 2013 plans. Individual Plaintiff John Morris also asserted partisan gerrymandering claims against Plan C235 (docket no. 784). This Court granted Defendants' motion to dismiss the political gerrymandering claims against the 2011 and 2013 plans in docket no. 886 and docket no. 1104, and thus all of TDP's and Morris's claims were dismissed. The Court also granted summary judgment on the Fifteenth Amendment claims against the 2011 and 2013 plans in docket no. 275 and docket no. 1108. *See* docket no. 1387.

This Court held a trial on Plan H283 in July 2014 and on Plan C185 in August 2014 and later issued extensive fact findings and rulings on Plaintiffs' claims. The Court found that certain aspects of those plans violated § 2 of the VRA and the Fourteenth Amendment. Docket no. 1365 (Order on Plan H283); docket no. 1364 (Fact Findings

related to Plan H283); docket no. 1390 (Amended Order on Plan C185); docket no. 1340 (Fact Findings).[13]

Plaintiffs contend that certain aspects of Plan C185 and Plan H283 that the Court found to be the product of discriminatory intent or constitutional and statutory violations were maintained in Plan C235 and Plan H358, rendering them infirm. In addition, Plaintiffs bring various statutory and constitutional challenges against Plan C235 and Plan H358. This Court held a trial on Plan C235 and Plan H358 in July 2017 and now issues rulings on Plaintiffs' claims against Plan C235.

I. Legal Standards

At this stage, this case involves claims under § 2 of the VRA and the Fourteenth Amendment. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969). Under § 2, Plaintiffs assert both "results" vote dilution and intentional discrimination/vote dilution claims. Under the Fourteenth Amendment, Plaintiffs assert both intentional discrimination/vote dilution and *Shaw*-type racial gerrymandering claims. The Court discussed these claims previously in its decisions on the 2011 plans, and will briefly summarize the applicable standards here.

---

[13] Judge Garcia and Judge Rodriguez adopt the prior fact findings and opinions and incorporate them into this Order because they are relevant to the 2013 plan claims. In this Order, Judge Smith agrees that the Court's orders on the 2011 plans are law of the case. The findings and conclusions in this order are therefore not inconsistent with what this district court panel has already decided.

A. § 2 of the Voting Rights Act

Section 2 of the VRA "was designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (internal quotations omitted). In its current form, § 2(a) provides that no voting standard, practice, or procedure "shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b)." 52 U.S.C. § 10301(a). Under section 2(b), a state violates § 2 "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by [§ 2(a) of the VRA] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Section 2 prohibits all race discrimination in voting,[14] but claims under § 2 generally assert vote denial or vote dilution injuries.

The Supreme Court held in *Mobile v. Bolden*, 446 U.S. 55 (1980),that a race-based vote dilution claim under the Fourteenth Amendment required racially discriminatory intent, not simply dilutive results.[15] In passing the 1982

---

[14] *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986).

[15] *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) ("Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment,

amendments to the VRA, Congress reacted to that decision. *Velasquez v. City of Abilene, Tex.*, 725 F.2d 1017, 1021 (5th Cir. 1984). As the Fifth Circuit noted in *LULAC v. Clements*, 999 F.2d 831, 849-51 (5th Cir. 1993), "the 1982 Amendments [to § 2] 'codify' the 'results test' articulated in" constitutional voting discrimination cases prior to *Mobile v. Bolden*, making clear that a § 2 violation could be proved without discriminatory intent.[16] However, the Legislative history of § 2 and case law also make clear that voters may bring a claim based on discriminatory voting practices using either the results test or an intentional discrimination test.[17] The Senate Report further states

---

has been required to establish that the State or political subdivision acted with a discriminatory purpose.").

[16] The Supreme Court noted in *Gingles* that the Senate Report states that amended § 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to *Mobile v. Bolden* and that in pre-*Bolden* cases such as *White v. Regester* plaintiffs could prevail by showing that, under the totality of circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. *Gingles*, 478 U.S. at 44 n.8; *see also Jones v. City of Lubbock*, 727 F.2d 364, 379 (5th Cir. 1984) (the amended § 2 codifies pre-*Bolden* vote dilution law).

[17] S. REP. NO. 97-417 ("The Amendment to the language of section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.") (footnote omitted); *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009) ("To violate the statute, however, these practices must be undertaken with an intent to discriminate or must produce discriminatory

that, if a § 2 plaintiff chooses to prove discriminatory intent, "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions" would be relevant evidence of intent. *McMillan*, 748 F.2d at 1046-47 (quoting S. REP. NO. 97-417 at 27 n.108).

1. Results Claims

As noted, Congress amended § 2 of the VRA in 1982 "to prohibit legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent." *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (emphasis in original). Such results claims are governed by the framework established in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Gingles* identified three threshold conditions for establishing a § 2 results violation: (1) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Johnson v. De Grandy*, 512 U.S. 997, 1006-07 (1994); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

---

results."); *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990) ("[A]fter the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes."); *McMillan v. Escambia Cty., Fla.*, 748 F.2d 1037, 1046 (5th Cir. 1984) ("Congress intended that fulfilling *either* the more restrictive intent test or the results test would be sufficient to show a violation of section 2.")(emphasis in original).

"When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). A minority population (either singly or combined in coalition with other minorities[18]) is sufficiently large when it constitutes greater than 50% of the citizen voting age population of the district. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999). Because the decennial census data does not include CVAP data, the Court has instructed the parties to use the five-year 2011-2015 ACS survey data to best approximate the CVAP in 2013, when the maps were enacted.[19]

Generally, to evaluate § 2 results claims, it must be determined how many "reasonably compact districts" exist in the enacted plan, and whether Plaintiffs have demonstrated that more were required, which is usually done through presentation of demonstration maps. *LULAC v. Perry*, 548 U.S. 399, 430 (2006) ("*De Grandy*

---

[18] As discussed at length in the Court's opinion on plan H283 (and not repeated here), the Court finds that § 2 can require the creation of coalition districts.

[19] Because the § 2 results test is concerned only with whether the districting scheme *results* in vote dilution, and not the Legislature's knowledge or intent, *Shaw*, 509 U.S. at 641, the Court has concluded that evidence that best reflects the population at the time of redistricting should be considered to determine whether vote dilution resulted from the districting plans, regardless of whether the evidence or data was available to the Legislature at the time of redistricting.

requires a comparison between a challenger's proposal and the 'existing number of reasonably compact districts.'"). When evaluating compactness, the Court focuses on the compactness of the minority population (in terms of its size and concentration), not the compactness of the contested district or necessarily the precise shape of its boundaries, though the shape of the district is relevant insofar as it provides evidence concerning the compactness of the minority population. *LULAC v. Perry*, 548 U.S. 399, 433 (2006); *Houston v. Lafayette Cty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995).[20]

If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district, and a district that reaches out to grab small and apparently isolated minority communities is not reasonably compact. *Bush v. Vera*, 517 U.S. 952, 979 (1996); *LULAC*, 548 U.S. at 432. However, members of a racial group in different areas could share similar interests and therefore form a compact district "if the areas are in reasonably close proximity." *LULAC*, 548 U.S. at 435. "A district would not be sufficiently compact if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived in the district." *Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 737-38 (S.D. Tex. 2013) (citing *Clark v. Calhoun Cty., Miss.*,

---

[20] In its most recent decision, the Supreme Court phrased the requirement as being that the minority population must be sufficiently large and geographically compact to constitute a majority "in some reasonably configured legislative district." *Harris*, 137 S. Ct. at 1470.

21 F.3d 92, 96 (5th Cir. 1994) (noting that "[a] number of courts have concluded that the first *Gingles* precondition is not satisfied if the proposed district does not retain a natural sense of community such that it can be effectively represented")).

Further, the § 2 compactness inquiry must take into account traditional districting principles such as maintaining communities of interest and traditional boundaries. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (citing *Bush v. Vera*, 517 U.S. 952, 977 (1996)); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1391-92 (E.D. Wa. 2014) ("The compactness inquiry under § 2 . . . focuses more generally on whether the proposed minority district reasonably comports with 'traditional districting principles' such as contiguousness, population equality, maintaining communities of interest, respecting traditional boundaries, and providing protection to incumbents."). "The recognition of nonracial communities of interest reflects the principle that a State may not assume from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (internal quotations and alterations omitted).

Thus, to evaluate compactness, the Court considers the dispersion of the relevant minority population, the shape of the proposed district (as measured by a visual evaluation and by statistical measures of compactness) and the causes underlying its shape, and the district's compliance with traditional redistricting principles (such as respect for communities of interest and traditional boundaries). *See Rodriguez*, 964 F. Supp. 2d at 737-54; *see also Vera v. Richards*, 861 F. Supp. 1304, 1341 (S.D. Tex. 1994) (noting that a district's compactness must be a

relative measure based on location and population density and that "[i]n a major urban county, compactness makes little sense if considered in terms of geographic sprawl alone, but it seems far more probative when viewed in terms of a city's or county's neighborhoods, geopolitical subdivisions, and business location"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).[21]

The second and third *Gingles* preconditions are referred to collectively as "racially polarized voting." Defendants conceded the existence of racially polarized voting across Texas, except in Nueces and Kleberg Counties, in terms of the fact that minority voters and Anglo voters tend to vote differently. The fact that minority voters and Anglo voters tend to support different candidates in Texas is essentially undisputed and is supported by all the expert testimony in the case, regardless of the methodology used (except with regard to Travis County).[22] However, Defendants dispute

---

[21] If the proposed demonstration district is bizarrely shaped because the minority population within it is not reasonably compact, then § 2 generally will not require the district. However, § 2 does not require compact districts, and bizarre shape may be the result of non-racial factors such as geographical constraints and respecting precinct and city boundaries. Thus, the shape of the district is relevant, but the Court must examine the reasons for the district's shape.

[22] Racial bloc voting and minority-group political cohesion never can be assumed, but must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2. *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (citing *Growe v. Emison*, 507 U.S. 25, 40-41 (1993)). However, there is ample evidence in the record to support Defendants' concession, at least concerning Latino voter cohesion, African-American voter cohesion, and Anglo bloc voting. Defendants do not concede that minority voters are cohesive

whether such racially polarized voting is legally significant in terms of the degree of minority cohesion and Anglo crossover voting, and in terms of whether such racially polarized voting is the result of race as opposed to politics.[23]

---

with each other for purposes of coalition districts because they often vote for different candidates in primary elections, though they vote cohesively in general elections for the candidates who emerge from the Democratic primaries. In addition, the Court previously found in its Opinion on Plan C185 that there is not racially polarized voting in Travis County because Anglo voters do not typically vote sufficiently as a bloc to usually defeat minority-preferred candidates.

[23] In this regard, Defendants rely on the Fifth Circuit's decision in *LULAC v. Clements*, 999 F.2d 23 831, 850 (5th Cir. 1993) (en banc), in which the court accepted the argument that "[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens," vote dilution is not "on account of race or color" as required by the VRA. The court noted that the question was "not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *Id.* The district court held that plaintiffs "need only demonstrate that whites and blacks generally support different candidates to establish legally significant white bloc voting." *Id.* Defendants argued that the district court erred in refusing to consider the nonracial causes of voting preferences they offered. The Fifth Circuit agreed, holding that "[i]n holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat," in violation of *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and the consensus of a majority of justices in concurring opinions in *Thornburg v. Gingles*, 478 U.S. 30 (1986) (specifically Justices Powell, Rehnquist, O'Connor, Burger, and White). *Clements*, 999 F.2d at 850-51.

If all three *Gingles* preconditions are satisfied, § 2 requires consideration of the "totality of circumstances" to determine whether members of a racial group have less opportunity than do other members of the electorate. *LULAC v. Perry*, 548 U.S. 399, 425-26 (2006). The Supreme Court has referred to the Senate Report on the 1982 amendments to the VRA, which identifies factors typically relevant to a § 2 claim, including:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . .; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 426 (quoting S. REP. NO. 97-417 at 117,206). The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group, and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous, may have probative value. *LULAC*, 548 U.S. at 426.

Last, although § 2 does not guarantee proportional representation, proportionality—whether the number of

districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area—is always a relevant consideration. *LULAC*, 548 U.S. at 426; *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

2. § 2 Intentional Discrimination/Intentional Vote Dilution

As discussed in this Court's opinion on Plan C185, the Supreme Court has declined to decide whether the *Gingles* preconditions apply to intentional vote dilution/discrimination claims under § 2. Docket no. 1390 at 116 ("[T]he Supreme Court expressly stated in *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009), that it did not consider 'whether intentional discrimination affects the *Gingles* analysis' and that its holding (setting forth the majority-minority requirement to satisfy the first *Gingles* factor for a § 2 results claim) 'does not apply to cases in which there is intentional discrimination against a racial minority.'"). This Court previously concluded that Plaintiffs are not required to satisfy the first *Gingles* precondition to prove discriminatory racial gerrymandering and intentional vote dilution, but that the other § 2 factors, including the existence of racially polarized voting and the totality of circumstances, remain relevant to such claims. Docket no. 1390 at 118. The ultimate § 2 inquiry remains whether minority voters have less opportunity to participate in the political processes and to elect candidates of their choice. *See Rogers v. Lodge*, 458 U.S. 613, 624 (1982).

Further, the rubric for analyzing discriminatory purpose under § 2 is the same as under the Equal Protection Clause of the Constitution. Discriminatory

intent is shown when racial discrimination was a motivating factor in the governing body's decision to adopt or maintain a voting practice or procedure. *Brown*, 561 F.3d at 433 ("Under the intent-based approach, '[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act' for a violation [of § 2] to occur.")[24]; *Garza*, 918 F.2d at 766 ("To the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the fourteenth amendment.").

B. Fourteenth Amendment claims

Plaintiffs bring two types of claims under the Equal Protection Clause of the Fourteenth Amendment, the central purpose of which "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). The first claim is a racial discrimination claim, which requires racially discriminatory intent and discriminatory effect. The second claim is a *Shaw*-type racial gerrymandering

---

[24] In *United States v. Brown*, the Fifth Circuit noted that the Senate factors supply a source of circumstantial evidence regarding discriminatory intent, as do the factors set forth in *Arlington Heights*. 561 F.3d at 433. As this Court previously concluded, these factors are a relevant source of evidence to be considered as part of the totality of circumstances. However, discriminatory results remain insufficient by themselves to establish discriminatory intent. *Mobile*, 446 U.S. at 71 n.17 ("Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

claim, the essence of which is that mapdrawers have separated voters into districts on the basis of race, and which does not require racially discriminatory intent.[25]

1. Intentional Racial Discrimination/Intentional Vote Dilution

Legislative apportionment schemes may violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (internal quotations omitted) (affirming district court's finding that at-large voting scheme, although racially neutral when adopted, was being maintained for the invidious purpose of diluting the voting strength of the black population).[26] A showing of racially motivated discrimination is a necessary element for a successful claim of unconstitutional vote

---

[25] *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (noting that a *Shaw*-type claim is "analytically distinct" from a vote dilution claim because a vote dilution claim "alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race[, while] the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts" regardless of motive) (internal citations omitted).

[26] *See also Shaw v. Reno*, 509 U.S. 630, 641 (1993) (electoral schemes "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (legislative apportionment scheme is unconstitutional if its purpose was "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities").

dilution under the Fourteenth Amendment. *Reno v. Bossier Barish Sch. Bd.*, 520 U.S. 471, 481 (1997) (citing *Mobile v. Bolden*, 446 U.S. 55, 66 (1980)).

Discriminatory intent need not be proved by direct evidence. *Rogers*, 458 U.S. at 618. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.* (quoting *Arlington Heights*, 429 U.S. at 265)[27]. Determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.*

Courts should look to the Supreme Court's decision in *Arlington Heights* for guidance in analyzing whether invidious discriminatory purpose was a motivating factor in a government body's decisionmaking. *Bossier Parish*, 520 U.S. at 488. The important starting point for assessing discriminatory intent is "the impact of the official action whether it 'bears more heavily on one race than another.'" *Id.* at 489. Other relevant considerations include: the historical background of the jurisdiction's decision, the specific sequence of events leading up to the challenged decision, departures from the normal procedural sequence, and the legislative history, especially any contemporary statements by members of the decisionmaking body. *Id.*; *Arlington Heights*, 429 U.S. at 268.

---

[27] As noted, disproportionate effects alone are insufficient to establish a claim of unconstitutional vote dilution.

2. "*Shaw*-type" Racial Gerrymandering Claim

Although a "legislature always is *aware* of race when it draws district lines," *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (emphasis in original), it may not use race as the predominant factor in drawing district lines unless it has a compelling reason. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). A *Shaw*-type racial gerrymandering claim[28] is "that race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (emphasis omitted). In such a claim, the plaintiff's evidentiary burden is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motiving the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 1267.[29] The Court's decision in *Bethune-Hill v. Virginia*

---

[28] The Court refers to these claims as *Shaw*-type claims because the Supreme Court first recognized the viability of such a claim under the Equal Protection Clause in *Shaw v. Reno*, 509 U.S. 630 (1993).

[29] Laws that classify citizens on the basis of race are constitutionally suspect, regardless of whether the reason for the classification is benign or the purpose remedial. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996); *see also id.* at 907 ("Racial classifications are antithetical to the Fourteenth Amendment . . . ."). The essence of a *Shaw*-type equal protection claim is that the State has used race as a basis for separating voters into districts. *Miller*, 515 U.S. at 911. Such use of race "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw v. Reno*, 509 U.S. 630, 650 (1993). Further, such use of race reinforces the belief "that individuals should be judged by the color of their skin" and "[r]acial gerrymandering,

State Bd. of Elections, 137 S. Ct. at 799, additionally made clear that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering" and that courts should evaluate the predominant motive for the design of the district as a whole.

If race predominates, strict scrutiny applies. To survive strict scrutiny, the challenged districting plan must be narrowly tailored to serve a compelling governmental interest. *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996). For a racial classification to serve a compelling interest, the Legislature must have a strong basis in evidence to support that interest before it implements the classification. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996). Further, the means chosen to accomplish the State's asserted purpose must be specifically and narrowly tailored to accomplish that purpose. *Id.* at 908. To be narrowly tailored, the legislative action must substantially address, if not achieve, the avowed purpose. *Id.* at 915.

This Court previously concluded that compliance with § 2 of the VRA constitutes a compelling governmental interest. Docket no. 1390 at 42 (citing *Bush*, 517 U.S. at 994 (O'Connor, J., concurring); *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1405-06 (5th Cir. 1996)). When a State invokes the VRA to justify race-based districting, it "must have a strong basis in evidence for concluding that the

---

even for remedial purposes, may balkanize us into competing racial factions" and "threatens to carry us further from the goal of a political system in which race no longer matters." *Id.* at 657.

three *Gingles* preconditions exist in order to claim that its redistricting plan is reasonably necessary to comply with § 2." *Clark*, 88 F.3d at 1405-06; *see also Shaw*, 517 U.S. at 915; *Bush*, 517 U.S. at 978 ("The State must have a 'strong basis in evidence' for finding that the threshold conditions for § 2 liability [i.e., the *Gingles* preconditions] are present."); *Harris*, 137 S. Ct. at 1471.[30] "If a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not." *Harris*, 137 S. Ct. at 1470 (citation omitted).

The legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored. *Shaw v. Hunt*, 517 U.S. at 915. "If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id.* at 917 (quoting 42 U.S.C. § 1973(b)). The State may "use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." *LULAC v. Perry*, 548 U.S. 399, 429 (2006).

Compliance with § 5 of the VRA was also a compelling state interest at the time these plans were enacted. However, "a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid

---

[30] "[The] 'strong basis' (or 'good reasons') standard gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Harris*, 137 S. Ct. at 1464.

retrogression." *Shaw v. Reno*, 509 U.S. 630, 655 (1993); *see also Alabama LBC*, 135 S. Ct. at 1274 (noting that the proper question for § 5 nonretrogression is, "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?").

II. Claims based on legislative intent

This case is unusually complex given the Legislature's enactment in 2013 of the Court's interim plans. As noted, the 2013 enactment raised questions of mootness in the 2011 plan phase, and now raises difficult questions concerning the proper resolution of Plaintiffs' *Shaw*-type and intentional vote dilution claims in the 2013 plan case.

Although Plaintiffs' claims focus on specific areas where they have suffered harm, as they must given that racial discrimination and vote dilution claims belong to individuals and not the minority group as a whole,[31] the redistricting plans are statewide plans, and Plaintiffs contend that the statewide plans were adopted with discriminatory intent. In addition, with regard to specific areas in which this Court found *Shaw*-type violations and intentional discrimination, Plaintiffs contend that such

---

[31] *See LULAC v. Perry*, 548 U.S. 399, 437 (2006) ("A local appraisal is necessary because the right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'"); *Alabama LBC v. Alabama*, 135 S. Ct. 1257, 1265-66 (2015) (noting that the harms that underlie a racial gerrymandering claim are personal, including being personally subjected to a racial classification and being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group, though noting that voters could make the claim that every individual district in a state suffers from racial gerrymandering).

violations remain in the 2013 plans. Defendants contend that the 2013 Legislature could have no discriminatory intent because it simply relied on this Court's judgment that the plans contained no legal infirmities, despite the interim nature of the plans and the Court's warnings that its decisions were necessarily hasty and not based upon a full review of the facts or the law. Defendants assert that the 2013 Legislature's lack of intent to discriminate in 2013 and the fact that it did not actually draw any districts subject to *Shaw*-type challenges in the interim plans in 2013 mean that all such claims must fail for lack of the necessary intent.[32]

Defendants' position incorrectly assumes that the intent inquiry must be limited to the drawing of district lines in 2013. The Fifth Circuit has rejected such a position: "[C]ases of this circuit emphasize that the search for improper motivation does not end at the enacting stage." *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978). Rather, the Fifth Circuit has proposed three means by which a plaintiff could meet the purpose standard: A plaintiff could demonstrate either through direct or circumstantial evidence that the government body *adopted* the electoral scheme with a discriminatory purpose, that the government body *maintained* the scheme with discriminatory purpose,[33] or that the system

---

[32] Defendants refer specifically to district lines that remain unchanged from the interim plans; the Task Force Plaintiffs have raised a new *Shaw* claim against changes made to HD90 in Plan H358 during the 2013 special session. This discussion does not involve that claim.

[33] *McMillan v. Escambia Cty., Fla.*, 688 F.2d 960 (1982) (affirming district court's holding that at-large voting scheme was being maintained for a discriminatory purpose), *vacated on other*

furthered pre-existing intentional discrimination.[34] *Jones v. City of Lubbock*, 727 F.2d 364, 377 (5th Cir. 1984) (discussing *Nevett*, 571 F.2d at 217-21).[35] Thus, under

---

grounds 466 U.S. 48 (1984) (vacating judgment on constitutional grounds and remanding for consideration of whether § 2 claims would support the judgment); *see also Mobile v. Bolden*, 446 U.S. 55 (1980) (considering whether maintenance of Mobile's at-large system for election of City Commissioners violated the Fourteenth Amendment as purposefully racially discriminatory).

[34] *See Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 142 (5th Cir. 1977) ("A redistricting plan is constitutionally impermissible as racially discriminatory if it is a racially motivated gerrymander or if it perpetuates an existent denial of access by the racial minority to the political process."). In *Kirksey*, the court stated:

> Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial. The redistricting body would only need to adopt a racially benign plan that permitted the record of the past to continue unabated. Such a rule would sub silentio overrule *White v. Regester*. It would emasculate the efforts of racial minorities to break out of patterns of political discrimination.

Id. at 146-47. The Court acknowledged that the Supreme Court had required discriminatory purpose in *Washington v. Davis* and in *Arlington Heights*, but reasoned that "nothing in these cases suggests that, where purposeful and intentional discrimination already exists, it can be constitutionally perpetuated into the future by neutral official action." *Id.* at 148.

[35] In *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978), the Fifth Circuit recognized that a plan, racially neutral at its adoption, may further preexisting intentional discrimination, or it may be maintained for invidious purposes. Whether invidious discrimination

these precedents, although the 2013 Legislature did not draw the challenged districts in Plan C235 and Plan H358 (other than HD90), Plaintiffs could nevertheless establish their claim by showing that the Legislature adopted the plans with a discriminatory purpose, maintained the district lines with a discriminatory purpose, or intentionally furthered preexisting intentional discrimination.

In addition, the Supreme Court case of *Hunter v. Underwood*, 471 U.S. 222 (1985), refutes Defendants' position. In *Hunter*, the Supreme Court held that a felon disenfranchisement provision adopted with discriminatory intent in 1901 violated the Equal Protection Clause in 1985, regardless of the fact that certain of the more blatantly discriminatory selections had been struck down by the courts, because "its original

---

motivates the adoption or maintenance of a districting scheme or whether the plan furthers preexisting purposeful discrimination, the intent requirement may be satisfied by direct or circumstantial evidence. *Nevett* was decided before the Supreme Court's decision in *Mobile v. Bolden*, but as the Supreme Court noted in *Rogers v. Lodge*, the Fifth Circuit held in *Nevett* that a showing of racially motivated discrimination is a necessary element in an equal protection vote dilution claim. *Rogers*, 458 U.S. at 621 (quoting *Nevett*, 571 F.2d at 219). In *Jones v. City of Lubbock*, 727 F.2d 364, 377 (1984), the Fifth Circuit stated that *Mobile v. Bolden* "cast doubt on the viability of this court's analysis in *Nevett II*." What it cast doubt on, however, is what proof suffices to establish discriminatory purpose, as the Fifth Circuit had relied on the "objective factors endorsed in *Zimmer*" and post-*Bolden* cases "differed in their evaluation of the extent to which the *Zimmer* analysis survived *Bolden*." *Id.* at 378; *see also Corder v. Kirksey*, 639 F.2d 1191, 1194 (5th Cir. 1981) ("Our failure, however, appears to have turned on the quantum of evidence required for such a finding [of discriminatory intent], rather than upon the substance of the approach itself.").

enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233. With regard to those areas in Plan C185 and Plan H283 where the Court found that district lines were drawn with impermissible motive and those lines remain unchanged in Plan C235 and Plan H358 such that discrimination continues to have its intended effect, *Hunter* indicates that those portions of the plans remain unlawful. In those areas, the district lines were motivated by a desire to discriminate on account of race, and they continue to have that effect; thus, they violate § 2 and the Constitution.

Defendants contend that the Legislature's adoption of the Court's interim plans nevertheless removed any such illegality from the plans; they assert that their enactment of the plans in 2013 with no improper motive removes any discriminatory intent. *Hunter* involved the passage of time and a narrowing of the discriminatory legislation by the courts; it did not involve a later reenactment of the narrowed disenfranchisement law, which is what Defendants now claim cleanses the plans. Other courts have considered the effect of subsequent legislative enactments on the legislative intent inquiry. The most relevant case, because it comes from the Fifth Circuit and involves redistricting, is *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).

In *Chen*, the plaintiffs mounted a *Shaw*-type racial gerrymandering claim against the City of Houston's districting, and contended that "the 1997 plan substantially maintained the borders of previous plans, and that those borders were set by a process in which race—specifically, the desire to create two black and two Hispanic single member districts—predominated." *Id.* at

513. The plaintiffs argued "that the City violated *Shaw* by failing to make substantial changes in a districting structure that was originally designed in a manner that race predominated over traditional districting concerns." *Id.* at 518.

The Fifth Circuit rejected the City's assertion and the district court's conclusion that the intent behind the creation of the prior plans was not properly before the court. *Id.* It noted that, in the context of the VRA, "evidence that impermissible racial intent had tainted the plan upon which the challenged plan was based has been allowed, even when enough time has elapsed for a substantial degree of familiarity and political reliance to emerge." *Id.* The Court then considered Plaintiffs' evidence concerning the earlier redistricting process, but found that its quality fell "far short of that introduced in the cases examined by the Supreme Court," and the Court did not find that race predominated in the drawing of earlier plans (*i.e.*, there was no prior impermissible reliance on race). *Id.* Later in the opinion, the Court stated that,

> while the district court erred in categorically and totally dismissing evidence of intent garnered from prior plans, it was correct to point out that the state of mind involved in the prior plans is not of itself what is precisely and directly the ultimate issue before the Court in this case. We have noted in a different context that while under *Hunter* the discriminatory intent of the original drafter may carry forward despite subsequent judicial invalidation of the most obviously discriminatory provisions, intervening reenactment

with meaningful alterations may render the current law valid.

Id. at 521 (citing *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998)).[36] It continued, "We do not suggest that the

---

[36] The Court included the following parenthetical to describe *Cotton*: "while [the] disenfranchisement constitutional provision originated in an attempt to discriminate, subsequent reenactment with alterations approved by voters added categories of crimes originally excluded because they were not considered 'Black' crimes and subtracted a less serious offense that had been considered a 'Black' crime." In *Cotton*, the Fifth Circuit noted that *Hunter* "left open the possibility that by amendment, a facially neutral provision . . . might overcome its odious origin." 157 F.3d at 391. Although the disenfranchisement provision at issue was originally enacted in 1890 with discriminatory intent, it was amended in 1950 and 1968 through a deliberative process, which the court held could "supersede" the previous provision and "remove[] the discriminatory taint associated with the original version" unless the amendments "were adopted out of a desire to discriminate against blacks." *Id.* at 391-92. Because the Court found no such evidence and because the amended statute sought "to penalize all criminals convicted of certain crimes, Hunter [did] not condemn" the law. *Id.* at 392. Thus, the Court based its holding on the lack of new discriminatory intent during re-enactment and the fact that the amended statute no longer targeted "black" crimes.

The Court notes that there is an important distinction between a felon disenfranchisement law and a district that violates *Shaw*. According to *Cotton*, a law disenfranchising convicted felons is unconstitutional only if it has the intent and effect of racial discrimination, making discriminatory purpose the paramount consideration. Discriminatory purpose is not an element of a *Shaw*-type claim. As this Court has discussed, a district drawn in violation of the *Shaw* principles is illegitimate regardless of whether it was drawn with racially discriminatory purpose because its illegality turns on whether race predominated in the decision of which voters to include and exclude in the district, whenever that decision is made,

changes implemented in 1993, 1995, and 1997 to the original framework were as dramatic as those in *Cotton*. However, that case broadly stands for the important point that when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered." *Id.*

Plaintiffs argue that the taint of discriminatory intent is generally removed from amended legislation only where a fact-specific inquiry reveals that the new statute was enacted significantly later than the discriminatory one,[37] legislators underwent a "deliberative process" prior

---

and whether there was a strong basis in evidence for such use of race. The passage of time or the re-enactment of a plan including the identical district does not typically change any facts concerning which voters were placed within or without the district when it was drawn, unlike discriminatory intent, which can change over time. Thus, the original decisions concerning which voters to place in and out of a district should remain the focus for inquiry in a *Shaw* claim, regardless of a later re-enactment of the identical district, unless there is a showing that the legislature specifically considered who should be in the district during the later re-enactment. Similarly, whether the legislature had a strong basis in evidence for the use of race originally should remain the operative inquiry. However, to the extent a subsequent legislature may have a strong basis in evidence for a previous use of racially predominant criteria that did not exist at the time of the initial enactment, that legislative intent would be relevant in determining whether a district that was an unconstitutional gerrymander when drawn remains so.

[37] The 2013 plans were enacted by a substantially similar Legislature with the same leadership only two years after the original enactment. This factor weighs in Plaintiffs' favor. In addition, the *Arlington Heights* factor of the history of discrimination continues to support a finding of discrimination, bolstered by this Court's finding of discriminatory intent by the 2011 Legislature in passing the 2011

to amendment or reenactment, and the new statute does not continue the same adverse racially disparate impact. *E.g.*, docket no. 1524 at 9-10. While the Court does not agree that the presence or absence of any of these factors is necessarily dispositive, it agrees that these are relevant considerations for analysis. Based on *Chen/Cotton* and *Hunter*, the Court finds the most important consideration is whether the 2011 plans continue to have discriminatory or illegal effect, and whether the reenactment furthers that existing discrimination: "A state law prohibiting exercise of the vote . . . is unconstitutional if 'its original enactment was motivated by a desire to discriminate against blacks on account of race and the section *continues to this day to have that effect.*'" *Cotton*, 157 F.3d at 391 (citing *Hunter*, 471 U.S. at 233) (emphasis added).

In *Chen*, the Fifth Circuit found no *Shaw* violation in the original enactment; thus, there was no issue of a continuing harm. Similarly, in *Cotton*, the Fifth Circuit noted that the amendments to the felon disenfranchisement statute meant that it no longer targeted "black" crimes and that it "now seeks only to penalize all criminals convicted of certain crimes" such that there was no longer any unconstitutional harm flowing from the statute. *Cotton*, 157 F.3d at 392.

Here, in contrast, specific portions of the 2011 plans that this Court has found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects "continu[ing] to this day." *Hunter*, 471 U.S. at 233. The fact that this Court made changes to the statewide plans

---

plans themselves. Further, there is no indication that the Legislature mitigated its hostility to minority districts.

and the Legislature then adopted the Court's plans does not change this fact. Further, the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans. No changes were made to the congressional plan, and changes to the House plan were subject to severe constraints, rendering them largely cosmetic. Although this Court did not rule out the possibility that coalition districts could be required or that the County Line Rule would have to yield to the VRA, the Legislature continued its steadfast refusal to consider either possibility. And despite the findings of discriminatory intent by the D.C. Court, there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans. Instead, the Legislature pushed the redistricting bills through quickly in a special session.[38] Rep. Martinez Fischer testified that necessary resources were not allocated to support a true deliberative process.[39]

Moreover, the adoption of the interim plans intentionally furthered and continued any discrimination that might be found in the 2011 plans and incorporated into the 2013 plans. The Legislature did not adopt the Court's plans with the intent to adopt legally compliant plans free from discriminatory taint, but as part of a litigation strategy. Defendants had steadfastly maintained that their 2011 plans had no legal infirmities—

---

[38] The special session did not have a two-thirds rule in the Senate or a calendar rule in the House.

[39] The HRC did not have counsel when the session started, and later Darby announced his intent to hire counsel only for himself. The attorneys later asked to withdraw and the committee was then directed to the TLC. JX-13.4 at 4-5.

throughout this litigation in 2011, when sponsoring the compromise plans in 2012 that became the interim plans, and thereafter. Although the D.C. Court found that the 2011 plans violated § 5 of the VRA and cited evidence of discriminatory intent, Defendants did not accept those rulings and instead appealed to the Supreme Court. Yet upon the urging of the Attorney General, who was responsible for the litigation in this court, they decided to adopt the interim maps.

The decision to adopt the interim plans was not a change of heart concerning the validity of any of Plaintiffs' claims[40] in either this litigation or the D.C. Court litigation and was not an attempt to adopt plans that fully complied with the VRA and the Constitution—it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities.[41]

---

[40] *E.g.*, JX-5 (Bill Analysis of SB 1524 introduced by Sen. Seliger in the regular session) ("Though the Texas Legislature remains confident that the legislatively-drawn maps adopted in 2011 are fair and legal and comply with all provisions of federal law, there remain several outstanding legal questions regarding these maps that undermine the stability and predictability of the electoral process in Texas.")

[41] The evidence indicates that not only did the strategy originate in the Attorney General's office, but also the legislative fact findings accompanying the plans, before the Legislature had engaged in any fact findings on the bills. Tr1558 (Darby). The fact findings in the introduced versions of the bills included that the interim plans complied "with all federal and state constitutional provisions or laws applicable to redistricting plans." Later, when Sen. Zaffirini offered an amendment to remove the legislative findings, Seliger objected, asserting that the amendment "guts the bill." JX-24.4 at § I p. 13. The amendment failed. The Senate later agreed to remove the language from the Senate plan, which everyone agreed was lawful, but refused

The letter from then-Attorney General Abbott to Speaker Joe Straus makes the strategy clear: Abbott advised that the "best way to avoid further intervention from federal judges in the Texas redistricting plans" and "insulate the State's redistricting plans from further legal challenge" was to adopt the interim maps. Quesada-57; DX-858. Thus, Defendants sought to avoid any liability for the 2011 plans by arguing that they were moot, and sought to ensure that any legal infirmities that remained in the 2013 plans were immune from any intentional discrimination and *Shaw*-type racial gerrymandering claims.

Defendants knew that most Plaintiffs would maintain claims against the interim plans if adopted, despite the changes, and that such challenges might indicate that further changes to the maps were required. With regard to the interim plans, Abbott's letter does not say that the plans cure legal infirmities in the plan, only that they "have the approval from the federal judges overseeing this litigation." *Id.* Although this Court had "approved" the maps for use as interim maps, given the severe time constraints it was operating under at the time of their adoption, the Court clearly warned that its preliminary conclusions, which were based on the preliminary injunction "likelihood of success" standard, were not based on a full examination of the record or the governing law and were subject to revision.[42]

---

to eliminate it from the House and congressional plan bills. Tr1558 (Darby).

[42] The Court noted, "It is especially difficult to determine whether a claim has a likelihood of success when the law is unsettled, as many areas of § 2 are." Docket no. 691 at 1-2. In addition, this Court was required to defer substantially to the legislative choices and district lines in Plan C185 and Plan H283, and emphasized that its

The Legislature's own attorney, Jeff Archer, advised them accordingly. JX-14.4 at 6-19; *id.* at 11 (noting that this Court was "in a little bit [of a] tricky [position] because the Court had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best case guesses . . . ."); *id.* at 11-12 (the Court's caveats were "as if to say this is the best we can do now. We haven't gotten to the bottom of things."); *id.* at 12 (noting that the Court was not making final determinations, that the Court noted unsettled and difficult legal issues and factual disputes, and "essentially made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues").[43] Given the remaining legal challenges and this Court's warnings that the interim maps were enacted without a full review of the facts or the law, a reasonable construction of this Court's orders leaves the definite possibility that, upon full review, additional changes would be required to the interim plans in response to legal infirmities.

---

determinations were preliminary and made on an expedited basis. Although the Court endeavored under the time constraints to ensure that the plan contained no legal defects, it did not guarantee that to be the case, and in fact warned repeatedly that its determinations could change after a full trial on the merits.

[43] At a later committee hearing, Archer correctly explained this Court's position: this Court faced "a tension there between what they thought the Voting Rights Act required and what they thought the deference they had to give until they were sure what the Voting Rights Act required." JX-15.3 at 52. He also noted that "they could go into a lot more issues than they already have." *Id.* at 49.

Moreover, given the D.C. Court's findings of intentional discrimination, Defendants saw a very real possibility that this Court would likewise find that the 2011 plans were the product of discriminatory intent.[44] Rather than trying to cleanse the plans of continuing discriminatory intent or legal defect, Defendants' strategy involved adopting the interim maps, however flawed, arguing that the 2011 plans would never go into effect and thus could have no harmful effects, and arguing that the 2013 plans could have no impermissible intent such that, whatever possible or likely discriminatory or unconstitutional effects remained in those plans, Plaintiffs would have no remedy, and Defendants would maintain the benefit of such discrimination or unconstitutional effects. By arguing that there may have been intent but no effect in 2011 and there may have been effect but no intent in 2013, despite the fact that there is unquestionably both intent and ongoing effect, Defendants' actions in 2013 were attempting to prevent Plaintiffs from obtaining relief for purposeful racial discrimination.

In Defendants' view, Plaintiffs could obtain no relief for the Legislature's past discrimination in 2011, and any discriminatory intent and effects remaining in the 2013 plans, however harmful, would be safe from challenge.[45]

---

[44] And they were aware that, even if the Supreme Court ruled in *Shelby County* that § 4's preclearance coverage formula was unconstitutional, such a finding of intentional discrimination could result in Texas being placed under § 5 through bail in.

[45] The Legislature did not believe that passing the interim maps would end the litigation. They knew that Plaintiffs would pursue claims against the interim maps, and they were informed by TLC attorney Jeff Archer that they had not realistically removed legal

This strategy is discriminatory at its heart and should not insulate either plan from review. *Cf. Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 146-47 (5th Cir. 1977) ("Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial.").

---

challenges to the plans apart from those areas remedied by the interim plans. JX-14.4 at 18; *id.* at 19 (explaining that "challenges to both the Court drawn fixes as well as to the background districts that were not changed in any of the plans will go forward" and "the parties to the case will continue to press issues"); JX-15.3 at 56 ("I think it's fair to say by enacting the Court-ordered plan, you've put to bed . . . those issues that the Court identified so far. But I don't know that you put the rest to bed."). Despite knowing that Plaintiffs would continue to pursue relief, they sought to deprive Plaintiffs of a potential remedy. Further, because they felt their strategy would preclude any remedy and they wanted to maintain any partisan advantage obtained regardless of whether it was the result of intentional racial discrimination, they were not truly interested in fixing any remaining discrimination in the plan. Thus, although Darby kept stating that he wanted to be informed of legal deficiencies so he could fix them, he did not himself seek to have the plan evaluated for deficiencies and he willfully ignored those who pointed out deficiencies, continuing to emphasize that he had thought "from the start" that the interim plans were fully legal. JX-17.3 at S5. Defendants' strategy would leave Plaintiffs with § 2 effects claims only, and Defendants intended to continue vigorously opposing any plan with coalition districts, despite Fifth Circuit case law holding that such districts could be required. Tr1576-78 (Darby).

In sum, the Court concludes that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged. The discriminatory taint was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy. The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.

III. Dallas-Fort Worth area ("DFW") Claims

Plaintiffs brought § 2 results claims and intentional vote dilution claims, as well as Fourteenth Amendment racial discrimination claims against the DFW districts in Plan C185. Interim Plan C235 made significant changes to the DFW area to address the "not insubstantial" § 5 discriminatory purpose claims of packing and cracking. Plaintiffs alleged that CD30, the only minority district, was packed, while "fingers" from surrounding Anglo-majority districts reached into urban and suburban Dallas and Tarrant County areas to crack minority communities and subsume them in Anglo-dominated districts. As a result, despite its substantial minority population, the DFW metroplex had only one minority opportunity district (CD30) that performed for African Americans, and none for Latino voters.

To address the § 5 discrimination claims, Plan C235 included new CD33, spanning Dallas and Tarrant Counties. Plan C235 withdrew many of the encroachments into minority communities from the Anglo districts surrounding DFW, and the population left

behind in DFW from the removed encroachments was placed in new CD33, while accommodating congressional incumbents and taking into account population growth. Docket no. 691 at 36-37. In addition, the minority population of CD30 was decreased somewhat to address the packing allegations, with the Court noting that the H+BVAP of CD30 was 76.7% in the benchmark, 81.5% in Plan C185, and 75.9% in Plan C235. *Id.* at 37 & n.83.[46] Given the unsettled law and the inability to look at all the necessary factual evidence, the Court was unable to conclude at the time that Plaintiffs were likely to succeed on their § 2 claims premised upon coalition districts. It also found that the Task Force Plaintiffs were not likely to succeed on their claim that a Latino opportunity district was required because their proposed HCVAP-majority district (CD6 in Plan C190) was not compact.

In the Opinion on Plan C185, this Court found that Plaintiffs failed to prove their § 2 results claims in DFW because they failed to satisfy the first *Gingles* precondition for the Latino and coalition districts insofar as none of the proposed districts were compact. Docket no. 1390 at 58-92.[47] The Court did find that mapdrawers violated the Equal Protection Clause by improperly using race in drawing CD26 in violation of the *Shaw* line of cases. And, it found that mapdrawers acted with racially discriminatory intent and intentionally diluted minority

---

[46] CD30 was also altered to address the intentional discrimination claims brought by African-American Congressperson Eddie Bernice Johnson, who represented CD30.

[47] However, Plaintiffs were not precluded from bringing § 2 results claims against Plan C235 based on the *Gingles* preconditions and the totality of circumstances in 2013.

voting strength in DFW by intentionally packing and cracking minorities. Docket no. 1390 at 146. Specifically, the Court found that minorities were moved into CD30 to waste their votes, while Anglo voters were moved out of CD30 and into neighboring districts to shore them up as Republican districts, and that mapdrawers drew and then divided a proposed minority district in the DFW area to minimize current and future minority voting power.

The Plaintiffs' packing and cracking intentional discrimination/dilution claim in this case is essentially the same "not insubstantial" § 5 discriminatory purpose claim that the Court attempted to remedy in Plan C235, but certain Plaintiffs complain that the discrimination is not fully remedied. They contend that packing and cracking remain, intended to prevent the emergence of an additional minority district or districts. Plaintiffs assert that two or three minority opportunity districts are required in addition to CD30 and that the DFW configuration intentionally limits minority opportunity to two districts when more opportunity districts can easily be drawn. The Quesada Plaintiffs further contend that the Legislature intentionally discriminated by knowingly reaffirming discriminatory features identified by the D.C. Court, including specifically the cracking of minority populations in Arlington and Grand Prairie.

As explained in the Court's order adopting Plan C235, CD33 was not intentionally drawn as a minority coalition district under § 2. Rather, it was created to remedy the alleged intentional discrimination (cracking) claims by removing the fingers from the Anglo-majority districts that reached into Dallas and Fort Worth. However, it is majority-minority CVAP when Black and Hispanic CVAP are combined, and it has elected an African-American,

Marc Veasey. It has thus performed as a minority coalition district under most Plaintiffs' view that such districts require minority cohesion only in the general elections.[48] On this basis, the Court concluded in its Order on Plan C185 that Plaintiffs' claims that one minority coalition district was required in DFW (in addition to African-American district CD30) were moot.

However, Plaintiffs continue to assert that more minority opportunity districts are required in DFW, especially one that can elect a Latino candidate of choice in the primary and general elections, to reflect the Latino growth in the area. Certain Plaintiffs contend that CD33 does not provide Latino opportunity because of its failure

---

[48] The Task Force does not share this view, but the Task Force also has not sought the creation of any coalition districts in DFW. Rather, the Task Force sought only the creation of an HCVAP-majority Latino opportunity district. However, the Task Force's proposed district (CD6 in Plan C190) was not compact, and because of the dispersion of Latinos among African Americans, a compact HCVAP-majority district cannot be drawn in DFW using 2011-2015 ACS data.

Other Plaintiffs did seek the creation of a coalition district in DFW, however. And although several of these Plaintiffs (except the Rodriguez Plaintiffs) now contend that CD33 is not a coalition opportunity district but an African-American opportunity district because African-American voters are controlling the Democratic primaries, these Plaintiffs also contend that coalition opportunity for purposes of a *Gingles* results claim should be determined by the general elections, not primaries. Thus, their prior claim that one coalition district was required in DFW under the § 2 results test was mooted by the drawing of a district that performs as a coalition district in the general election.

to elect the Latino-preferred candidate in the primary despite its HCVAP.[49]

Defendants contend that (1) there is no evidence of dilutive intent in 2013, (2) no single-minority-majority-CVAP district can be drawn and coalition districts are not required by § 2, and (3) even if coalition districts were required, the record refutes the existence of cohesive voting between Hispanic and African-American voters in the DFW area, as shown primarily by the results of Democratic primaries. Docket no. 1526 at 81-82. The Court has already rejected Defendants' position that coalition districts can never be required by § 2, and does not repeat its analysis here. And the doctrine of constitutional avoidance counsels that this Court should address the statutory § 2 effects claim before analyzing Plaintiffs' constitutional claim. The Court thus considers whether Plaintiffs have satisfied the *Gingles* criteria.

Plaintiffs[50] agree that, despite the strong minority population growth in DFW, it is not possible to draw an

---

[49] The Rodriguez Plaintiffs do not challenge CD33 itself, but contend that its configuration "demonstrates the tortured lines the State had to draw in order to avoid creating an additional opportunity district for minorities in Texas." Docket no. 1524 at 24 n.21. They assert that it does not fix the cracking and packing this Court found in DFW under Plan C185 or "mask the hallmarks of intentional discrimination that persist in DFW under Plan C235," but "only highlights and perpetuates the State's consistent approach of cracking minority populations in DFW to avoid what would otherwise be inevitable: increased electoral opportunities for minority voters." *Id.*

[50] In this section, "Plaintiffs" generally refers to Plaintiffs other than the Task Force. Presumably the Task Force Plaintiffs, who previously argued that their proposed HCVAP-majority district was compact, do not agree that no compact HCVAP-majority can be

additional compact single minority-majority CVAP district. This is due primarily to the fact that minority populations are interspersed with each other, although these mixed minority populations are geographically concentrated. As a result, each of the proposed demonstration maps creates new minority coalition districts. The Court did not reach the issue of minority cohesion in proposed coalition districts in its prior orders because Plaintiffs did not clear the first *Gingles* hurdle. But the issue is now squarely presented. The Court acknowledges that the evidence presented in this case cuts both ways and the decision is close, but the Court concludes that Plaintiffs have not proved the necessary cohesion.

A. § 2 Results Claims

Gingles 1

Plaintiffs' demonstration plans C284 (NAACP), C273 (Quesada), and C286 (Rodriguez) generally take the same approach and create one additional minority coalition district (in addition to maintaining CD30 and CD33 as minority opportunity districts). Existing CD33, which spans Dallas and Tarrant Counties, is pushed entirely into Tarrant County and made much more compact. It remains a B+HCVAP-majority district, but its HCVAP is decreased and its BCVAP increased.[51] CD30, the

---

drawn in DFW. In addition, the Task Force Plaintiffs have asserted no claims against DFW in Plan C235.

[51]In Plan C235, it is 43.6% HCVAP and 23.7% Black Alone CVAP. In Plan C273, it is 23.4% HCVAP and 30.8% Black Alone CVAP. In Plan C284, it is 22.8% HCVAP and 29.4% Black Alone CVAP. In Plan C286, it is 24.6% HCVAP and 30% Black Alone CVAP.

existing BCVAP-majority opportunity district, generally maintains a similar location wholly within Dallas County, and its BCVAP remains above or near 50%.[52] The maps create the new coalition district in between CD30 and CD33, and each district has a combined H+BCVAP above 50%.[53] Thus, each district satisfies the numerosity threshold, and all three demonstration maps contain one more minority-majority district in DFW than does Plan C235.[54] In addition, based on a review of all the evidence, the Court finds that these districts reflect compact minority communities, including the various mixed-minority cities and neighborhoods within the DFW metroplex and respecting traditional redistricting principles and non-racial communities of interest.[55] *See*

---

[52] In Plan C235, CD30 is 53.2% BCVAP. In Plan C273, it is 49.8% Black Alone CVAP but 50.4% combined BCVAP. In Plan C284, it is 50% Black Alone CVAP and 50.6% combined BCVAP. In Plan C286, it is 54% BCVAP.

[53] In Plan C273, proposed CD3 is 38.4% HCVAP and 19.6% Black Alone CVAP. In Plan C284, proposed CD24 is 39.8% HCVAP and 19.1% Black Alone CVAP. In Plan C286, proposed CD24 is 36.1% HCVAP and 18.7% Black Alone CVAP.

[54] MALC Plan C285 creates an additional coalition district to the east of CD30.

[55] Given its conclusion on cohesion, the Court finds it unnecessary to detail all of the evidence here. But it notes that Dr. Ansolabahere did not set out to draw minority districts in Plan C286, but sought to adhere to municipal boundaries and compactness principles and to avoid dividing minority populations; as a result, his CD24 encompasses the adjacent, majority-minority cities of Irving and Grand Prairie and adds western Dallas and the City of Farmers Branch. CD30 retains its relatively compact shape and includes southern and eastern Dallas and all of the smaller municipalities to the south inside Dallas County. CD33 respects county lines by remaining wholly within Tarrant County and includes population

LULAC v. Perry, 548 U.S. 399, 433 (2006) (recognition of nonracial communities of interest reflects the principle that a state may not assume that members of the same race will share the same political interests and prefer the same candidates).

2. *Gingles* 2

Minority political cohesion is the second *Gingles* precondition, and is the focus of the parties' disagreement in this phase of the litigation. The purpose of this inquiry is "to ascertain whether minority group members constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. *Gingles* states that "[a] showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establish[ing] minority bloc voting within the context of § 2." *Gingles*, 478 U.S. at 56 (citation omitted). The Supreme Court in *Gingles* did not say that primary cohesion was required, but did note that political cohesiveness of black voters was clearly established where "black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16

---

from Fort Worth and Arlington. Its northwestern protrusion somewhat tracks that in Plan C235 but widens the neck and avoids splitting Sansom Park. The northeastern portion is widened and eliminates the protrusion into Forth Worth, and includes all of eastern Arlington rather than the precisely cut out areas in Plan C235. Further, it follows the general contours of CD33 in Plan C235 along the eastern edge of Fort Worth, but follows the Fort Worth municipal boundary on the eastern side instead of leaving small areas out of the district as in Plan C235. The Court further relies on Dr. Fairfax's analysis of NAACP Plan C284 and testimony from lay witnesses Franklin Moss and Rep. Toni Rose.

primary elections, black support for black candidates ranged between 71% and 92%; and in the general elections, black support for black Democratic candidates ranged between 87% and 96%." *Id.* at 59.

The Supreme Court has not offered specific guidance on proving cohesion in a coalition context, other than to say that "when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential" and there is a "higher-than-usual need for the second of the *Gingles* showings." *Growe v. Emison*, 507 U.S. 25, 41 (1993). This indicates that proof of cohesion is essential for coalition claims, but does not indicate that the standard for proving such cohesion is necessarily any different for coalitions than for single minorities.

In *Campos v. City of Baytown*, Tex., 840 F.2d 1240, 1244 (5th Cir. 1988), the Fifth Circuit held that, "[t]o prove the fact of their electoral dilution, plaintiffs must prove that the minorities so identified actually vote together and are impeded in their ability to elect their own candidates by all of the circumstances, including especially the bloc voting of a white majority that usually defeats the candidate of the minority." It noted that "the central focus" for the cohesion inquiry is upon voting patterns, and a minority group is politically cohesive if it votes together. *Id.* The court continued,

> the proper standard is the same as *Gingles*: whether the minority group together votes in a cohesive manner for the minority candidate. . . . The key is the minority group as a whole. Of course, if one part of the group cannot be expected to vote with the other part, the combination is not

> cohesive. If the evidence were to show that the Blacks vote against a Hispanic candidate, or *vice versa*, then the minority group could not be said to be cohesive. But if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown.

Id. at 1245 (footnote omitted). *Campos* does not specify in which election this voting pattern is relevant or necessary, and it does not mention primaries.

In *Overton v. City of Austin*, 871 F.2d 529, 544 (5th Cir. 1989), the Fifth Circuit looked at whether black and Mexican-American voters "usually combine[d] to support candidates who were usually disfavored by Anglo voters," but there was no discussion of primary elections.

In *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), the court considered cohesion among Hispanics, African Americans, and Asians in school board member elections and stated, "The determinative question is whether black-supported candidates receive a majority of the Hispanic and Asian vote; whether Hispanic-supported candidates receive a majority of the black and Asian vote; and whether Asian-supported candidates receive a majority of the black and Hispanic vote in most instances in the KISD area." *Id.* at 453 (citing *Campos*, 840 F.2d at 1244-45). There was no statistical evidence from the plaintiffs, and lay witness testimony differed on political cohesion among these groups. One expert's multivariate regression analysis showed African Americans and Hispanics were in direct opposition in most KISD elections in which minority candidates ran, and this evidence was unrebutted. The Court found that cohesion was lacking.

This case sheds no specific light on the primary issue, however.

In *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004), the district court rejected plaintiffs' coalition claim in DFW because "there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation."[56] On appeal, the Supreme Court did not consider whether such lack of primary cohesion was important, instead "[a]ccepting . . . that African-Americans do not vote cohesively with Hispanics." *LULAC v. Perry*, 548 U.S. 399, 443 (2006). It accepted this fact to decide the question presented on appeal, which was not whether African Americans and Hispanics were politically cohesive, but whether African Americans had effective control of CD24, even though African Americans made up only 25.7% of the district's CVAP. The plaintiffs argued that they could control the district because they were 64% of voters in the Democratic primary, and that their control of the primary translated into effective control of the entire election.

The district court rejected the argument that African Americans could control the primary because the district was drawn for an Anglo Democrat (Frost), who had no opposition in any primary since his incumbency began,

---

[56] The district court also stated that, even assuming Blacks and Hispanics vote cohesively, they must disprove partisanship as the driving force behind the bloc voting, citing *LULAC v. Clements*, 999 F.2d 831, 850 (1993) (en banc). *Session*, 298 F. Supp. 2d at 478 n.88. The parties in this case vigorously dispute the application of *LULAC v. Clements* and whether the role of partisanship must be disproved as a cause of racial voting behavior. Because the Court does not find cohesion, it does not address this dispute.

and CD24's demographics were similar to another district where an African-American candidate failed when he ran against an Anglo. Instead, the district court found that the district was controlled by Anglo Democrats. On appeal, the Supreme Court found no clear error in this finding, stating that the lack of any contested Democratic primary over the last 20 years left "no obvious benchmark . . . for deciding whether African-Americans could elect their candidate of choice." *LULAC*, 548 at 444. It continued,

> The fact that African-Americans voted for Frost—in the primary and general elections—could signify he is their candidate of choice. Without a contested primary, however, it could also be interpreted to show (assuming racial bloc voting) that Anglos and Latinos would vote in the Democratic primary in greater numbers if an African-American candidate of choice were to run, especially given Texas's open primary system. The District Court heard trial testimony that would support both explanations, and we cannot say that it erred in crediting the testimony that endorsed the latter interpretation.

LULAC, 548 U.S. at 444. The Court continued,

> The opportunity "to elect representatives of their choice," requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost's

> election does not make the old District 24 an African-American opportunity district for purposes of § 2. If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.

Id. at 445-46 (internal citations omitted).

Defendants contend that this language is dispositive of the issue of the role of primaries in cohesion, and that without evidence of cohesion in contested primaries, no coalition claim can be proved. But the Supreme Court did not consider the issue of minority cohesion at all. The Court looked only to the factual question of whether African-Americans actually had the ability to control outcomes in the district, and that fact could not be determined without showing ability to control the primaries. African-American voters were turning out in greater numbers than others in the primary. While this was de facto control, it did not translate into actual control of the primary, because the primary was uncontested—Anglo voters who controlled the district and originally sponsored Frost simply did not feel the need to turn out in the primary because their preferred candidate would emerge regardless. If an African-American (or presumably, African-American-sponsored but not necessarily African-American) candidate did run in the primary, there was no guarantee that candidate would win because African-American voters could be easily outnumbered.

Thus, even though African Americans were voting for Frost in both the primary and the general elections, this did not automatically make Frost their candidate of

choice. The evidence credited by the courts showed it was likely that they were merely voting for the candidate they were permitted to vote for by the Anglos who controlled the district. Thus, because they could not show that they actually controlled the district, as opposed to simply voting along with Anglos who in fact controlled the district, their claim failed.

This discussion in *LULAC* highlights the intensely local and factual appraisal required by § 2 claims, and it indicates that primaries can aid courts in determining voters' candidates of choice—not only by considering who voters are voting for in the primaries (which is relevant to which candidates they prefer), but considering all the relevant circumstances. *LULAC* supports the conclusion that primaries should not be excluded from the minority cohesion analysis, but it does not answer the question of the weight to be given particular primary voting patterns in determining cohesion in this case.

Thus, the current case law from the Fifth Circuit and Supreme Court confirms that primaries are relevant, but provides little guidance on their probative value. Cases outside the Fifth Circuit take conflicting views. In *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D N.Y.), *aff'd*, 543 U.S. 997 (2004), the court held that when the two minority groups are generally affiliated with the same party and vote for that party's candidates at high rates, primaries are by far the most probative evidence of cohesion. The court relied on lack of primary cohesion and "the fact that the plaintiffs have presented cohesion evidence for a very limited portion of their proposed district" to find that plaintiffs failed to prove Black-Hispanic political cohesion. *Id.* at 422.

In contrast, the D.C. Court in the § 5 preclearance litigation rejected Texas's reliance on primaries in considering HD149 in the Houston area. It noted that there was persuasive evidence of both concerted efforts among a coalition to elect its preferred candidates and a pattern of success extending across multiple election cycles. *Texas v. United States*, 887 F. Supp. 2d 133, 174 (D.D.C. 2012). Texas argued that the minority groups "do not vote cohesively in primaries and only come together to agree on a second- or third-best candidate in time for the general election" and "this does not prove an effective coalition district." *Id.* The D.C. Court stated,

> We agree that evidence of shared voting preferences at the primary level would be powerful evidence of a working coalition, but it is not needed to prove cohesion. In the first place, there is little support for Texas's focus on primary elections. Texas cites *LULAC* for this point, but *LULAC*, a section 2 case, only talks about primaries as a method to determine one minority group's candidate of choice; it says nothing about the need for two groups in a putative coalition to vote cohesively in a primary. More importantly, it does not hold that evidence of cohesion in a primary is necessary to identify a candidate of choice. The same is true here, where there has been no contested endogenous Democratic primary since 2004, when Rep. Vo first won his seat. Texas also cites two district court cases that rely on primary cohesion, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y. 2004); and *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D.Tex. 2004), but these cases

represent the minority view. Most courts to address this issue have expressed no preference about the election level at which voting cohesion must be shown. *See, e.g., Lewis v. Alamance Cnty.*, 99 F.3d 600, 615 (4th Cir. 1996); *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 886 (5th Cir. 1993) (en banc); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283, 115 S.Ct. 35, 129 L.Ed.2d 931 (1994).

We agree with the majority view. Courts regularly consider general election data to demonstrate voter cohesion in traditional majority-minority districts, without any indication that such a showing is insufficient without evidence of voter cohesion in the primary as well. Additionally, requiring cohesion in the primary election distorts the role of the primary. Although minority groups sometimes coalesce around a candidate at that point in time, minority voters, like any other voters, use the primary to help develop their preferences. We refuse to penalize minority voters for acting like other groups in a political party who do not coalesce around a candidate until the race is on for the general election. *See Alamance Cnty.*, 99 F.3d at 614-16 ("We reject the proposition that success of a minority-preferred candidate in a general election is entitled to less weight when a candidate with far greater minority support was defeated in the primary.... [S]uch a view is grounded in the belief that minority voters

> essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail, a belief about minority voters that we do not share." (citation and internal quotation marks omitted)). "Pull, haul, and trade" describes the task of minority and majority voters alike, and candidates may be minority "candidates of choice" even if they do not "represent perfection to every minority voter."

Texas, 887 F. Supp. 2d at 174-75 (some citations omitted).[57]

Plaintiffs argue that they have shown the required cohesion in DFW through expert and lay testimony. Plaintiffs and their experts assert that the relevant focus is on which party primaries minorities choose and their general election cohesion, and that a lack of cohesion in

---

[57] The Court notes that *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996) was not a case about minority cohesion. Rather, the Fourth Circuit was evaluating whether the district court properly determined that the plaintiffs had failed to show that black-preferred candidates were usually defeated. In that regard, the plaintiffs argued that Democrats should be treated as black-preferred only if they were also black-preferred in the primary. The Fourth Circuit rejected that argument, holding that candidates who receive strong black support in general elections are the black-preferred candidate in that election, regardless of their level of support in the primary, and the elections should be counted accordingly in the determination of whether black-preferred candidates were usually defeated. *Id.* at 615. The Court also held that primary elections and general elections must be analyzed separately to determine whether black-preferred candidates were usually successful, to be sure that the regular defeat in one of these phases would not be masked by repeated successes in the other. *Id.* at 615. If anything, this case supports the argument that a court considering cohesion should also look at primaries.

the primaries should be considered irrelevant or, if relevant, should not undermine a finding of cohesion. They note that Defendants' expert, Dr. Alford, admitted that one way for minorities to show that they are politically cohesive is to coalesce around a major political party. Tr1443. Defendants, on the other hand, argue that focusing on the Democratic primaries is essential, and that Plaintiffs cannot establish minority political cohesion without proof of primary cohesion. Their expert, Dr. Alford, has consistently opined that "Blacks and Hispanics do not vote cohesively in either party [primary], and in fact are more likely than not to oppose each other's preferred candidates." Alford 2014 Supp. Report at 15.

Plaintiffs' experts offered various bases for their positions that the key focus should be on general election cohesion. These were generally that: (1) the general elections are the "key" or operative contests for electing candidates of choice; (2) the general elections involve many more voters and primary participation is small; (3) primary voters do not accurately reflect the voting population and are "skewed," and may even involve members of the other party because Texas has open primaries; (4) primary voting may be strategic wherein voters vote for second or third choice candidates because they believe they have a better chance at success in the general election. *See* docket no. 1340 ¶¶ 700-702; Tr1052, Tr1203-05 (Ansolabahere); Tr410-11 (Chervenak); Tr98, Tr114-15 (Brischetto). All of these factors affect the probative value of primary elections, but they do not require us to ignore primary elections altogether. As Dr. Alford explains, primaries reflect actual voting behavior, still involve a significant number of voters, and are an integral part of the process leading to election of

candidates. Tr1364, Tr1461. Because the most pertinent indicator of political behavior is voting behavior, this Court finds that primary elections should be considered as part of the minority group's overall voting behavior, but will give the primaries the weight the evidence shows that they deserve.

This Court previously made certain fact findings relevant to the issue of cohesion. The Court noted that there is a strong correlation between partisanship and ethnicity in current Texas politics, and that African Americans and Latinos have tended to identify with the Democratic party in recent years due to shared issues, lack of Republican vote courting, and the rise of the Tea Party, while more Anglos have shifted to the Republican party. Docket no. 1340 ¶¶ 678, 681. This has been more true for Latinos in recent years because Republicans have not done a very good job of reaching out to Latinos and some party positions on immigration do not attract Latinos. *Id.* ¶ 680. African Americans and Latinos share many common interests and generally feel that the Democratic party is more responsive to those interests.

Evidence from prior phases of this litigation consistently showed that, statewide, African Americans and Latinos choose to participate in Democratic primaries rather than Republican primaries[58] and consistently support the Democratic candidates in general elections,

---

[58] Docket no. 1340 ¶ 683 ("There is almost no African-American voter participation in the Republican primaries, and very little Hispanic participation."); *id.* ¶ 684 ("Dr. Lichtman found that Latino and African-American voters in Texas are cohesive in that both voter groups overwhelmingly choose to participate in Democratic rather than Republican primaries.").

regardless of their race. Docket no. 1340 ¶¶ 688, 696, 697, 706.[59] However, in the Democratic primaries originally studied by Dr. Engstrom (primaries for statewide offices in 2008 and 2010), he found that non-Latinos (which included both African American and Anglo voters) did not consistently share the candidate preferences of Latino voters. African-American voters shared support for only one of five primary candidates preferred by Latinos in Dallas and Tarrant Counties. Docket no. 1340 ¶ 685.

In his corrected Rebuttal report, Engstrom found that Latino voters were very cohesive in their preferences for Latino candidates in Democratic primaries but African-American support for Latino-preferred candidates was not typically present in primaries and, in fact, African-American voters had "a distinct tendency to vote for candidates competing with the candidates preferred by Latinos in primary elections." *Id.* ¶ 686. Dr. Alford also concluded that African-American and Hispanic voters are not generally cohesive in the Democratic primary, and that the polarization is based on the ethnicity of the candidates such that a "Black candidate will not typically be the candidate of choice of Hispanic voters in the Democratic primary" and "the Hispanic candidate will typically not be the candidate of choice of Black voters in the Democrat primary." *Id.* ¶ 687. Kousser also found that Latinos and African Americans were not cohesive in the

---

[59] This trend was so strong that Dr. Alford assessed whether districts were minority opportunity districts by looking at Democrat wins/losses and noted that in Texas, minority candidates of choice means Democrats. Docket no. 1340 ¶ 688. In this phase of the litigation, many of Plaintiffs' experts have taken a similar approach in assessing performance for minority districts.

Democratic primary, with Latinos voting for Latino candidates but African Americans not tending to support Latino candidates in the 2010 Democratic primaries. *Id.*

Based on all the prior evidence, this Court found that in general, Hispanic voters are politically cohesive in general and primary elections, African-American voters are politically cohesive in general and primary elections, Latinos and African Americans are often *not* cohesive within the Democratic primary, and African-American and Latino voters are politically cohesive in general elections in support of the Democratic candidate, regardless of the candidate's race. Docket no. 1340 ¶¶ 703-706. However, *Gingles* requires a local appraisal for minority cohesion. *See Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) ("Our recent opinion in *Overton v. City of Austin* cautions against reaching conclusions about inter-minority cohesion absent a diligent inquiry into the political dynamics of the particular community.").

It is undisputed that African-American and Latino voters show very high rates of cohesion in general elections in Texas in general and specifically in Dallas and Tarrant Counties. Dr. Ansolabahere testified that, based on his analysis, African-American and Latino voters vote cohesively in the general elections to elect their preferred candidates. Tr1201; Rod-955 (Table 9) (in Dallas County and Tarrant County Black support for Democratic candidates was estimated at 100%, while Latino support ranged from 68.4% to 81.7% in Dallas County and 71.5% to 80.6% in Tarrant County). Dr. Lichtman's ecological regression analysis found near-perfect cohesion in support of the Democratic candidate between African American and Latino voters in the five 2008 and 2010 general elections he studied: In Tarrant County both

estimates were 100% and in Dallas County both estimates were 99%. Joint Expert Ex. E-3 Table 2.

Dr. Engstrom previously found that Latinos in Dallas County supported the Latino candidate at high levels, between 81.1 and 88% and African-American support was over 90% in all general elections. Docket no. 307-1 at 13. In Tarrant County, Dr. Engstrom found that Latinos supported the Latino candidate at high levels, between 84.3 and 98.3%, and African-American support was above 90% in all elections. Docket no. 307-1 at 18-19. Dr. Engstrom's 2017 analysis reveals that this trend generally continued in 2014 and 2016. TF-19. In Dallas County, Latinos supported Latino Democrat candidates at rates of 78.3, 73.4, and 87.2% and African Americans at 95.5, 94.9, and 92.9%. In Tarrant County, Latinos supported Latino Democrat candidates at rates of 81.2, 78.6, and 88.1%, and African Americans at 92.7, 92, and 92.4%. TF-19.

Chervenak's racially polarized voting analysis of recent elections within Dallas County and Tarrant County also found high levels of cohesion, with each group supporting candidates from both racial groups, and other voters not sharing their preferences. NAACP-2 at 6-8; Tr105 (Brischetto) ("The minority candidate of choice in the general elections have been the Democratic candidate in each case.").

It is also undisputed that African Americans and Latinos primarily choose to participate in Democratic primaries. With regard to choice of primary, Dr. Lichtman previously looked at individual counties. Joint Expert Ex. E-3. In Dallas County, he found that African Americans participated in the 2008 Democratic Primary at a rate of 97.52% and Latinos at a rate of 88.72%. African

Americans participated in the 2010 Democratic Primary at a rate of 90.43% and Latinos at a rate of 59.21%. In Tarrant County, he found that African Americans participated in the 2008 Democratic Primary at a rate of 96.33% and Latinos at a rate of 83.54%. In the 2010 Democratic Primary, African Americans participated at a rate of 81.25% and Latinos at a rate of 31.66%. Lichtman noted that the lower Latino participation in 2010 was likely due to relatively small numbers of Latino voters participating at all, and there was much lower Hispanic participation in Democratic primaries in 2010 than 2008, while Hispanic participation in Republican primaries remained relatively constant. Joint Expert Ex. E-3 at 5-6, Table 1. Dr. Engstrom also noted that "[t]he number of Latinos receiving ballots in the 2014 Democratic primary substantially exceeded those in the Republican primary that year." TF-19 at 6 n.2 (in Dallas County, 6,859 Democrat and 3,579 Republican, in Tarrant County 5,816 Democrat and 4,108 Republican).[60]

However, Defendants contend that, without proving cohesion in the Democratic primaries, Plaintiffs cannot establish *Gingles* 2 for coalition districts. As noted, though African Americans and Latinos are choosing to vote in the Democratic primaries, they are often not cohesive in Democratic primaries, and that remains true

---

[60] Dr. Lichtman's analysis of participation in the 2008 and 2010 Democratic primaries showed that many more African Americans vote in the primaries than do Latinos: In 2008 in Dallas County, 37,859 Hispanics voted while 86,528 African Americans voted. In 2010, 6,771 Hispanics voted while 23,522 African Americans voted. In 2008 in Tarrant County, 24,472 Hispanics voted while 36,116 African Americans voted. In 2010, 2,239 Hispanics voted, while 6,988 African Americans voted. Joint Expert Ex. E-3 Table 1.

in certain Democratic primaries in Tarrant and Dallas Counties. Dr. Engstrom previously analyzed statewide elections in 2006, 2008, and 2010, and found that African Americans were "the least likely group [between African Americans and 'others'] to support Latino candidates in Democratic primaries" in Dallas County and that African Americans supported the Latino candidate in only one of six primaries in Tarrant County. Docket no. 307-1 at 15, 20-21, Tables 5 & 7. There were no Democratic primaries in 2012 that met his inclusion criteria. Dr. Engstrom performed an updated primary analysis in 2017, but it includes only the 2010 Democratic primary for Governor with two candidates, Latino Reynaldo Madrigal and Anglo Wendy Davis. Madrigal was not the choice of Latino voters or African-American voters in either Dallas or Tarrant County, though he received higher Latino support (30.9% in Dallas County and 26.5% in Tarrant County) than African-American support (1.9% in Dallas County and .2% in Tarrant County). TF-19. Dr. Alford casts this primary as non-competitive and suggesting "at most that in a very non-competitive contest, the winning Anglo candidate was the choice of Anglos, Blacks, and Hispanics." D-878 (Alford 2017 Report) at 10.

The results of Dr. Engstrom's analyses for Democratic primaries in Dallas and Tarrant Counties are set forth in the following tables:

Dallas County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	27.2 24.5 - 29.9	50.5 46.6 - 54.5	43.2 41.4 - 45.0
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	34.8 31.8 - 37.6	60.2 52.2 - 68.7	43.4 40.6 - 46.3
2008 Dem. Primary US Senate (Noriega)	44.1 42.6 - 45.6	73.8 71.2 - 76.4	54.0 52.8 - 55.2
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 26.3 - 28.8	75.8 73.6 - 78.0	30.6 29.6 - 31.7
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	52.7 51.4 - 53.9	87.8 85.9 - 89.7	44.3 43.1 - 45.4
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	47.0 45.3 - 48.8	77.6 74.3 - 81.0	31.5 30.0 - 32.9

2010 Dem. Primary Land Comm'r (Uribe)	27.2 25.1 - 29.2	64.6 60.6 - 68.9	51.7 50.0 - 53.4
2014 Dem. Primary Governor (Madrigal)	1.9 0.8 - 3.2	30.9 26.4 - 34.7	2.7 1.5 - 4.0

Tarrant County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	30.8 25.5 - 35.8	46.2 39.0 - 53.5	45.3 43.1 - 47.5
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	30.4 25.5 - 35.1	66.1 56.4 -76.6	47.5 44.9 - 50.1
2008 Dem. Primary US Senate (Noriega)	66.0 63.4 - 68.7	72.4 68.2 - 76.9	51.5 50.5 - 52.5
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 24.2 - 30.9	79.4 74.2 - 85.1	31.2 30.0 - 32.4

2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	42.2 38.9 - 45.5	85.0 80.6 - 89.6	40.5 39.4 - 41.7
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	42.9 38.5 - 47.2	73.3 67.3 - 79.7	39.6 38.3 - 41.0
2010 Dem. Primary Land Comm'r (Uribe)	24.1 19.1 - 28.8	64.3 57.1 - 72.0	35.4 33.8 - 36.9
2014 Dem. Primary Governor (Madrigal)	0.2 0.1 - 0.5	26.5 22.9 - 29.9	1.7 1.0 - 2.5

Dr. Chervenak examined the 2012 Democratic primary for HD 101 in Tarrant County. NAACP-2 at 8, 17. His analysis showed that the black candidate (Barnett) "was not the preferred candidate of either black or Latino voters." *Id.* at 8. At trial, Plaintiffs' counsel elicited testimony from Dr. Alford that neither group preferred the black candidate and "they're voting for the same candidate." Tr1477-78 (Alford); NAACP-2 at 8, 17. However, Dr. Chervenak's analysis does not indicate whether and to what extent black and Latino voters coalesced in support of a candidate because there were two other candidates in addition to the black candidate.

The NAACP and African-American congresspersons note that, as shown in NAACP-46, there were many Democratic primary races in Dallas County in 2016 where Latino and African-American candidates were uncontested by members from the other race.

Dr. Alford notes that, in the current phase, the evidence relevant to minority cohesion in the Democratic primaries comes primarily from Dr. Engstrom. Reviewing that evidence, he concludes, as did Engstrom in his earlier report, that "they do not show Black-Hispanic cohesion, but instead, if anything, suggest opposition." D-878 at 10. He further notes that, aside from Engstrom's reports, there is "very little from the remaining [experts] that informs the question of cohesion in proposed coalition districts." *Id.* at 11. While Dr. Chervenak did include endogenous primaries, despite his position that only statewide general elections should be considered (due to a lack of sufficient elections), Alford notes that these only examine existing districts, and do not purport to demonstrate cohesion in primary elections in proposed districts.

Defendants further focus heavily on the primaries in HD90 in Tarrant County and CD33. Dr. Engstrom examined the 2012 HD90 Democratic primary using multivariate ecological inference. PL-967 at 7. He found 65.7% Latino support, 37.7% African-American support, and 30.2% non-minority support for the Latino candidate Carlos Vasquez against Anglo incumbent Lon Burnam. *Id.* at 7-8. There were 3,987 votes cast in the primary, and Vasquez lost by 159 votes: 2,073 to 1,914. *Id.* at 8. In the 2014 Democratic primary in HD90, Dr. Engstrom found Latino support for Romero was 78.2%, while African-American support was 12.6% (and other voters 24.3%).

TF-19 at 11, Table 4. There were 5,078 votes cast in the primary, and Romero won with 51.08% (2,594 votes). This race did not show cohesion between Latinos and African Americans. Tr433-34 (Chervenak). HD90 overlaps significantly with Plaintiffs' proposed CD33 in Tarrant County.

Defendants note that Hispanic and African-American voters did not support the same candidate in the 2012, 2014, or 2016 Democratic primaries in CD33. Tr1368-71 (Alford). Current CD33 areas would be included in Plaintiffs' proposed coalition districts. In the 2012 primary, CD33 was an open seat, and African-American Marc Veasey and Hispanic Domingo Garcia both sought the nomination. It appears undisputed that both were viable candidates. CD33 spans Dallas and Tarrant Counties; Veasey was from Fort Worth/Tarrant County, and Garcia was from Dallas. TrA1401 (Murray). Alford estimated that 77.9% of Hispanic voters supported Garcia, while 85% of African-American voters supported Veasey, "exhibiting fairly cohesive support for opposite candidates." Tr1367-68 (Alford); D-424 at 17; DX-883. Dr. Murray felt that both race and the county "home factor" affected voting in the runoff because each candidate won his home county, and Veasey did not receive much black support in Dallas County. TrA1401 ("There wasn't much turnout, and he didn't win it by much; whereas, he did very, very well in his home county of Tarrant. So there's this home factor. But, unquestionably, in this primary there's a good deal of voting for somebody that looks like you or has the same last name or your ethnic or racial group"). Korbel thought the district would have a high probability of electing a Hispanic but did not anticipate the home-county rivalry. Tr830-31.

However, despite the split in the primary, Murray noted that Black and Hispanic voters coalesced around Veasey in the general election, including those heavily Hispanic precincts that voted for Garcia in the primary. He compared the top four performing heavily Hispanic precincts for Garcia in the primary in Dallas County to see if they supported Veasey in the general election, and found that they did—the average support for Garcia in the primary was 91.3% but these same precincts had an average support for Veasey in the general election of 81%. NAACP-64 (Murray Feb. 28, 2014 Supplemental Report on Plan C235) at 20.

In the 2014 Democratic primary, Veasey (now the incumbent) received over 90% of the Black vote, while Hispanics split their vote almost evenly between Veasey and Sanchez. Tr1369-71 (Alford); DX-883. Thus, although half of Hispanic voters now supported Veasey, half did not.

And in the 2016 Democratic primary, Veasey again received over 90% support from Black voters, but his Hispanic support fell (from 49.6% in 2014 to 32.9% in 2016), and 67% of Hispanic voters supported Carlos Quintanilla. Tr1370-71; DX-883. Alford noted that, even after a considerable period of time in which we have an incumbent who's had a chance to effectively represent everyone in the district, Hispanic voters still would prefer that there be an Hispanic representative in that district. Tr1370-71.

Dr. Lichtman performed an ecological regression analysis of the percentage of Anglos, African Americans, and Latinos among voters participating in the Democratic primaries for CD33. Tr956-58; Quesada-1 (Lichtman report) at 50 (Table 2). In the 2012 primary, 2.4% of Latino

VAP turned out, making them 36% of voters in the primary; 14.8% of African American VAP turned out, making them 64% of voters, and Anglos were 0% of voters. In the 2012 runoff, 3.4% of Latino VAP turned out, making them 47% of voters, and 13% of African American VAP turned out, making them 53% of voters. In the 2014 primary, 2.3% of Latino VAP turned out, making them 35% of voters, and 15% of African American VAP turned out, making them 65% of voters. In the 2016 primary, 4.4% of Latino VAP turned out, making them 39% of voters, and 20.5% of African American VAP turned out, making them 53% of voters (Anglos were 8% of voters). This demonstrates how low primary turnout is overall, and especially for Latinos, whose highest turnout percentage was 4.4% of voting age population. It also confirms that African-American voters dominate the primary based on their relative turnout. Tr957-58.

All experts agree that both Latino and African-American voters strongly supported Veasey in the general election. Lichtman found 99% African-American support and 95% Latino support in 2012 and 100% African-American support and 98% Latino support in 2016. Tr959 ("[G]iven those degrees of cohesion, this is pretty safely a district where African Americans and Hispanics in the general election can elect candidates of their choice. And as I said, this is when you really get the verdict of voters, not in those low turnout primaries."); Lichtman Report at 52 (Table 4).

Lichtman's analysis showed that 55.7% of African-American VAP turned out in the 2012 general election, making them 41% of the voters, 10.8% of the Latino VAP turned out, making them 27% of the voters, and 41.2% of the Anglo VAP turned out, making them 32% of the

voters. Lichtman Report at 53 (Table 5). In 2016, 45.6% of the African-American VAP turned out, making them 31% of the voters, 14% of the Latino VAP turned out, making them 33% of the voters, and 49.6% of the Anglo VAP turned out, making them 35% of the voters. *Id.* Lichtman noted that this demonstrates that turnout in general elections is vastly higher than turnout in primaries, and that combined African Americans and Latinos comprise a majority of the electorate. Tr959. Dr. Alford felt that "partisan voting reunited Black and Hispanics in voting for the Democratic candidate" in the general election; he found that the evidence "does not support the assertion that there is a cohesive, geographically compact coalition that can be treated as a single group." D-424 at 18-19.[61]

Based on an analysis of primary elections in CD33, Alford's opinion is that black and Hispanic voters in the district are not cohesive in their choice of minority candidates in the primary in the district. Tr1371. He notes that this is why some Plaintiffs' experts characterize the current CD33 as a black opportunity district and not a coalition district. Tr1371-72.[62] He further notes this is why the *Gingles* proposals do not truly propose minority coalition opportunity districts, but either African-American or Hispanic opportunity districts. Plaintiffs' *Gingles* proposals, in one form or another, shift decidedly

---

[61] Dr. Alford also concluded that Anglo voters were not cohesive or at least "not polarized in a way that would enable the Anglo vote to block the nomination of a Black- or Hispanic-preferred candidate." D-424 at 18.

[62] Dr. Lichtman not only stated that CD33 is an African-American opportunity district, he stated that Hispanics are "shut out" in CD33 due to high African-American primary turnout. Tr955, Tr963.

in the direction of increasing the black CVAP proportion of CD33, not seeking to make the district work as a combined majority district, but seeking to make the district more securely a black opportunity district. Tr1374.[63] Similarly, the new coalition district placed between CD30 and CD33 is proposed to perform for Latinos, helping to cure the Latino representation gap in DFW. Although Alford agrees that black and Hispanic voters come together in the general election because of partisanship, he feels that whether they can get a representative of choice from their ethnic group is of critical value. Tr1382-83.

Dr. Alford admitted that in CD33, the general election turnout ranged from 28.2% in 2014 to 53.6% in 2016, while the Democratic primary turnout ranged from 1.3% in 2014 to 8.6% in 2016. Tr1454. He further admitted that the number of Hispanics who chose to vote for Veasey in the general election far surpassed the number that even turned out for the primary. Tr1460. For those Hispanic voters who did not vote in the primary, Quesada Plaintiffs contend that Veasey was their first and only choice, such that he was the first choice of 65.6% of Hispanic voters and the second choice of 17.9% of Hispanic voters, and not the choice of 16.4% of Hispanic voters. Docket no. 1527 at 47. Dr. Alford admits that he reaches his conclusion concerning the lack of cohesion solely on the primary elections and not general elections. Tr1448.

---

[63] Alford feels that many of the proposed coalition districts will turn out to be African-American districts, thus giving more representation to a group that is not significantly under-represented, while not fixing the underlying problem of Hispanic under-representation. Tr1380-81.

In addition to primaries, Defendants cite to lay witness testimony indicating a lack of cohesion, including specifically: (1) the testimony of Tarrant County commissioner Roy Brooks, who stated that in the CD33 primary and other elections, Black and Hispanic voters have supported different candidates, Tr1237[64]; (2) Franklin Moss's testimony that in Democratic primary elections in Tarrant County, Black and Hispanic voters are less likely to vote for the same candidates, Tr1307[65]; (3) Alex Jimenez's testimony that in Tarrant County, Black voters would rather support Anglo candidates than Hispanic candidates, Tr359[66] ; (4) Rep. Anchia's testimony concerning tension between black and Hispanic school board members on the Dallas School Board, Tr136; (5) Elizabeth Alvarez Bingham's deposition testimony that

---

[64] Brooks agreed that, in his experience in Tarrant County, sometimes African-American and Hispanic voters prefer different candidates in Democratic primary elections, such as in CD33 in 2012. Tr1237. The majority of African-American voters in Tarrant County supported Veasey and the majority of Hispanic voters in Tarrant County supported Garcia in the runoff. Tr1237. In general elections in Tarrant County, African-American voters and Hispanic voters coalesce to vote for the same candidate; they both tend to be Democrats. Tr1239 (Brooks).

[65] Moss had "been informed" that Latino and African-American voters do not always support the same candidates and agreed that would be more likely to occur in Democratic primaries. Tr1307. He also agreed that, in Tarrant County, all things being equal, African-American voters would prefer to have an African American represent them. Tr1307.

[66] "Q. In your experience in Tarrant County do you believe that African Americans would rather support Anglos than a Hispanic candidate? A. Yes."

minority groups do not vote cohesively in Dallas County (docket no. 1460-6 at 77-78[67]). Docket no. 1526 at 83-84.

Plaintiffs, on the other hand, offered testimony from lay witnesses to show cohesion. Franklin Moss is an African-American NAACP member who has been a Fort Worth resident for 72 years. He testified that he endorses Latino candidates, and he cited a recent Fort Worth City council election for District 2 as an example where African-American and Latino residents of Tarrant County worked together to elect a Latino candidate they both support. He testified that "a group of persons inside of the loop, 820," which is an area that is predominantly black and Hispanic, worked together to ensure that they elected a city council representative from District 2, and they have been successful in electing a Latino representative. Tr1297-98.

Rep. Toni Rose (HD110) from Dallas County testified that the Latino community came out in protest and support for a recent African-American police shooting victim. Tr1310. She also testified that the issues that face the African-American community and the Latino community are melded together; they both have issues with and are affected by access to health care, issues with poverty, issues with immigration, racial profiling. Tr1311. Rose stated that, in Dallas County, after the passage of

---

[67] "Hispanics in Dallas County do not all vote the same even within political parties. African-Americans as well. Even within political parties, there is a generational gap in the democratic party between older Hispanics and African-Americans and younger Hispanics and African-Americans. And within the democratic party there is a large disconnect and substantial infighting, cross-party accusations and claims of racism between the Hispanics and African-Americans in a democratic party as against each other."

SB4 (the sanctuary cities bill), the Latino community and the African-American communities came together to support the Latinos' efforts to have the City of Dallas join in the lawsuit in opposition to the bill. Tr1315-16. Rose testified that there is a political coalition between African Americans and Latinos in Dallas County, and that quite a few Latino judicial candidates who ran in county-wide races would not succeed without the coalition and African-American support.[68] Similarly, she felt that African-American county-wide officials would have the same difficulty without Latino support. Tr1311-12.

Rep. Johnson, an African American, long-time resident of Dallas County, and representative of HD100, testified that "when there are races that are conducted in districts where you have African-Americans and Latinos living together, which is a lot of my district and, frankly, most of the southern portion of Dallas before you get to the southern Dallas suburbs," then "voters of color" would coalesce around the same candidates. Tr518-19. He also testified that he receives Latino support in his elections and that they have never talked of running a candidate against him, because he is responsive to their interests. Tr519-20. He testified that Dallas County Sheriff Lupe Valdez "gets a lot of support across communities" and that she would not continually win without support from Latinos and African Americans. Tr520. He further

---

[68] Rose was aware that some had run in contested primaries, including Hector Garcia and Maricela Moore. She was not aware of Garcia's primary opponent, but she testified that Moore's opponent was Monica Purdy. Tr1321-22. She testified that Hispanics and African Americans voted for Moore, and assumed that because Moore won, she received a large amount of African American support, but she did not have specific knowledge of the voting patterns. Tr1322.

testified that his mother "loves" Rep. Anchia and "we have all kinds of crossover appeal like that in our districts because we've lived together for so long, those two communities." Tr520-21.

Rep. Anchia testified that MALC's proposed CD6 located in Irving and Grand Prairie roughly mirrored the county commissioner district in Dallas County represented by Elba Garcia, that Korbel's analysis indicated it would perform for the Democrat in general elections, and that it was likely that a Latino would win. Tr713-17. However, Rep. Anchia specifically stated at trial that he was not providing testimony on African-American and Latino cohesion. Tr719-20. Nevertheless, in his deposition, he testified that he had seen examples of Latinos and African Americans being cohesive in Dallas, and that he believes they are cohesive more often than not. Anchia depo. at 117, 163. And former Plaintiff Juanita Wallace, a long-time Dallas resident, offered testimony that Black and Latino voters work together to elect candidates, noting specifically Elba Garcia, who got significant support from Black voters, though she had not specifically reviewed election data for the race. TrJ568-59, TrJ582.

Raul Magdaleno testified that there is a coalition in Dallas between Latinos and African Americans, and that they tend to vote together based on issues important to them that they have in common, such as education, health care, and economic disparities. TrJ1134.

Both lay witness testimony concerning cooperation between the minority groups and statistical evidence can be used to prove cohesion. *See Brewer v. Ham*, 876 F.2d 448, 453-54 (5th Cir. 1989). Statistical evidence is not a legal requirement or the "sine qua non to establishing

cohesion," but Plaintiffs "must still satisfy their burden of proof." *Id.* at 454. Lay witnesses testified generally about black and Hispanic coalitions and shared political identity stemming from shared community concerns. Certainly it is undisputed that black and Hispanic voters choose primarily to vote in the Democratic primary, and that they vote cohesively for the Democratic candidate who emerges from the general election, regardless of the candidate's race, and regardless of whether they supported them in the primary.

Lay witness testimony concerning primary cohesion was mixed. And the statistical analyses of Democratic primaries in Dallas and Tarrant Counties consistently demonstrates that black and Latino voters are not cohesive. It seems undisputed that, all things being equal, each group would prefer a candidate that looks like them. *E.g.* Tr1307 (Moss) ("And in Tarrant County, all things being equal, you would agree with me that African American voters would prefer to have an African American represent them, right? A. Yes."). That is why Dr. Murray and the African-American Congresspersons have testified that, when there are roughly equal numbers of black and Latino population in a district, they will develop "tension" as each group vies to elect candidates of their own in the primaries. While it was explained that this was more likely when the groups were not consulted in drawing the districts or when representation for one or both groups was proportionately low, it indicates that these groups cannot functionally be treated as one in terms of voting behavior. And whether minority groups have the opportunity to elect candidates of their choice is the operative inquiry for *Gingles*. Primaries inform the analysis of whether each minority group in the coalition

has the opportunity to elect candidates of their choice, or whether, as Dr. Alford put it, one group is acting as "filler." Most Plaintiffs' experts agree that, in CD33, Latino voters are not able to elect their candidate of choice.[69]

Also troubling is the fact that African-American voters do not act cohesively in support of Latino candidates against Anglo candidates. While the probative value of the

---

[69] It is especially interesting that Latinos are not having success in CD33, given the expectation when it was drawn that it would perform for Latinos in light of its proportionately higher HCVAP. Contrasting the situation to that in CD24 in Dallas County considered in *LULAC v. Perry*, it cannot be said that Hispanic voters are simply allowing African-American voters to vote for their candidate of choice in the primary, because unlike CD24, where there was no contested primary, Hispanics have sponsored a candidate in the CD33 primaries. Although it need not decide the issue, the Court does not necessarily agree that Latinos lack opportunity in CD33. In *LULAC*, the Supreme Court noted that "[t]he opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice." 548 U.S. at 445. The African-American voters in CD24 could only ever influence the outcome of the primary given their low HCVAP% and lack of cohesion with Latinos (as found by the district court). In this case, black and Latino voters together can control the outcome of primaries in CD33, based on their numbers, if they vote together, and could thus demonstrate the opportunity required by *Gingles*. But they have not voted together in the primaries, and black voters have controlled the primaries based on relative turnout. But there are 142,637 citizen voting age Hispanics (327,150 multiplied by .436) and only 78,516 citizen voting age African Americans (327,150 multiplied by .24) in CD33, meaning that Hispanic voters should easily be able to defeat African-American voters if they increase their relative turnout. Regardless, unless they vote cohesively in the primaries, it is not a minority coalition opportunity district.

HD90 primaries is diminished by the fact that only approximately 5,000 voters or fewer are involved and the Anglo candidate was a long-time incumbent favored by the black community, Dr. Engstrom's primary analyses of statewide elections in Tarrant and Dallas Counties demonstrate that African Americans are even less likely to support Latino candidates than are Anglo voters. The consistent lack of cohesion severely undermines Plaintiffs' claims, as does their assertion that their new proposed coalition districts would perform for one group or the other, and not both cohesively.

Considering all of the lay witness and statistical evidence as a whole, the Court finds that Plaintiffs have failed to establish the necessary minority cohesion to satisfy *Gingles* 2. Accordingly, the *Gingles* results claims must fail.

B. Intentional Discrimination/Vote Dilution Claims

As noted, several Plaintiffs contend that the configuration of DFW and the addition of CD33 in DFW did not remedy the cracking and packing and intentional discrimination found by this Court concerning Plan C185. As discussed above, Plaintiffs complained generally that in Plan C185, minority communities in DFW were cracked (primarily within urban areas where fingers reached in from Anglo-dominated suburban districts). They also complained that CD30 was packed with minorities. This Court addressed those claims in Plan C235 by removing the fingers from minority areas, and what was left was CD33. The Court noted that CD33 was "appropriate to remedy the alleged race-based discrimination that occurred" but "goes no further than required under *Perry v. Perez*." Docket no. 691 at 38. When this Court later

analyzed the entire record, it found that Downton had intentionally drawn and cracked a proposed minority district. CD33 looks significantly like the proposed minority coalition district that this Court found was drawn and then intentionally cracked. Thus, CD33 in Plan C235 is an appropriate remedy for that cracking, without going further.

The Court also addressed Plaintiffs' claims that CD30 was packed in Plan C235 by reducing the combined minority population to near benchmark levels.[70] When this Court later analyzed the entire record, it found that Downton had moved Anglo voters out of CD30 and minority voters into CD30, increasing the minority population above benchmark levels. Because Plan C235 returned these population levels to slightly below benchmark levels, it appropriately remedied that packing.

Plaintiffs complain that Plan C235 does not remedy all of the cracking because minority communities in other portions of DFW remain divided, and they contend that it does not remedy all of the packing in CD30 because CD30 needs far fewer minority votes to continue functioning as an African-American ability district, and those excess minority votes are thus being wasted. They contend that, together, the remaining cracking and packing prevents the creation of additional minority opportunity districts. The Court has already found, however, that Plaintiffs

---

[70] This Court noted that the combined H+BVAP was increased from 76.7% in the benchmark to 81.5% in Plan C185, but reduced to 75.9% in Plan C235. Docket no. 691 at 37 n.83. The D.C. Court also noted that CD30 was packed insofar as the combined minority voting age population was increased from the benchmark district by 4.8%. *Texas v. United States*, 887 F. Supp. 2d at 222 (fact finding 120). This packing was remedied by Plan C235.

failed to demonstrate that additional minority opportunity districts with cohesive minority communities could be drawn. In addition, the fact that CD30 has a higher-than-necessary minority population is not itself unlawful packing. That higher-than-necessary minority population was in CD30 in the benchmark, thus Downton did not put those voters into CD30 with a discriminatory purpose when he drew Plan C185. And while Plaintiffs contend that those voters could be placed into other districts to create additional opportunity districts, the failure of their *Gingles* claims shows that removing these voters would not create additional single-minority or minority coalition districts. Thus, the Court finds that Plan C235 adequately remedies the cracking and packing found by this Court.

Last, the Quesada Plaintiffs further indicate that this Court should fix the cracking of southeast Arlington/Grand Prairie found by the D.C. Court because it remains in Plan C235. Quesada Plaintiffs note that, in the section of its fact findings and conclusions of law entitled "Discriminatory Purpose in the Congressional Plan," the D.C. Court included the following finding:

> 112. CD 33 is one of the State's newly apportioned congressional districts. In the Congressional Plan, this district includes all of Parker County and parts of Wise County, both of which are predominantly comprised of Anglo, suburban areas. Anglos make up 85.3% of the population in Parker County and the portion of Wise County included in CD 33 is 78.7% Anglo. Pl.'s Ex. 12. In addition to those Anglo areas, CD 33 cuts into Tarrant County to include Tarrant County's fast-growing minority

> populations. Representative Veasey testified that enacted CD 33 "goes around southwest—underneath southeast Ft. Worth in the unincorporated Tarrant County, and then moves into Arlington, into the heavily Anglo part of Arlington, and then picks up the fast minority growth area in southeast Tarrant County, Arlington—southeast Arlington–Grand Prairie area." Trial Tr. 23, Jan. 18, 2012 PM (Rep. Veasey).

887 F. Supp. 2d at 220. The D.C. Court did not find that this particular cracking was unlawful, however. In an area with many minority communities, it is inevitable that some minority communities will remain cracked, and they cannot all be placed into a minority opportunity district. Because cracking this community has not been shown to intentionally or in effect prevent the creation of an additional opportunity district or to minimize minority influence, uncracking is not required.

As a result, the Court finds that Plaintiffs' intentional discrimination/vote dilution claims as to Dallas County fail as to Plan C235. No additional remedies are required in the DFW area.

IV. Houston area

Plaintiffs asserted § 2 results and statutory and constitutional discrimination claims in the Houston area with regard to Plan C185. With regard to the § 2 results claims, the Court found that Plaintiffs had failed to establish the first *Gingles* precondition for their proposed districts , but this did not preclude Plaintiffs from pursuing these claims with regard to Plan C235 with population data reflecting the minority population in 2013, when Plan C235 was adopted. Docket no. 1390 at 146-158.

The Court did not find sufficient evidence of racial gerrymandering or racially discriminatory motive. *Id.* at 158-163. Though there was some circumstantial evidence consistent with racial discrimination, the Court ultimately found that Plaintiffs failed to sufficiently distinguish the role of race and politics in the drawing of district lines in Houston. *Id.* at 162.

The NAACP Plaintiffs and MALC bring § 2 results claims in the Houston area with regard to Plan C235. Docket no. 897 (MALC) ¶¶ 60-61. MALC proposes new coalition districts in Plan C285, and NAACP joins in MALC's plan.

Dr. Murray testified in 2011 that there is Latino growth outside of CD9 and CD18 in Houston, which would have an impact on the ability to draw a new Latino opportunity district because "there's a lot of raw material to work with." Tr1283. He testified that there was growth in the southeastern part of the county, some in the present CD29, but there was also a lot of growth in CD22 and CD36. He also testified that districts 2 and 7 contain substantial areas of heavily Latino voter concentrations. Tr1283-84. He felt that a functional Latino opportunity district could be added, though he had not seen a plan creating a new HCVAP-majority district. Tr1273-74.

In Plan C235, CD29 is an HCVAP-majority (61.6%) district that consistently elects an Anglo Democrat, and CD9 and CD18 are near majority-BCVAP (48.5% and 47%, respectively) districts that consistently elect African-American Democrats. MALC offers the only demonstration plan for the Houston area in this phase, Plan C285, which proposes two additional minority opportunity districts—it maintains the existing African-American districts as ability districts, creates a new

HCVAP-majority district, reworking CD29 into a coalition district, and creates an additional coalition district. JX-104. Expert George Korbel drew Plan C285, and he testified that he tried to simplify the existing minority districts while creating two additional minority opportunity districts. Tr736.

He created new HCVAP-majority (50.7%) district CD36 that he characterized as a "ship channel district" that includes Galena Park and Pasadena, South Houston, Baytown, and Channelview. Tr736-37. CD34 is a new B+HCVAP coalition district (53.3%) dominated by Acres Homes, Studemont, and Oak Forest and the areas in the Spring Branch Independent School District that are north of I-10. Tr736-37. CD18 is the "traditional black district" that was "simplified" and includes Third Ward, Fifth Ward, Montrose, Kashmere Gardens, and black neighborhoods all throughout the center part of Houston. Tr737. Both its BCVAP and HCVAP are reduced from Plan C235 and it becomes 40.2% BCVAP and 18.2% HCVAP. JX-104.3. CD29 includes Aldine and parts of Spring Branch and Sharpstown and Gulfton. Tr737. It is no longer majority-HCVAP but is a 37.6% HCVAP + 16.5% BCVAP coalition district. JX-104.3; Tr738, Tr742. CD9 was then modified "slightly" to fit in with the other districts as a south Harris County district with virtually all the neighborhoods that were in CD9. Tr737-38. Both its BCVAP and HCVAP are reduced from Plan C235 to 41.4% BCVAP and 18.4% HCVAP.

Korbel testified that he tried to put these districts entirely within the urban areas, and in doing that, created five minority districts; all of the districts consistently functioned over the test period for Democrats in the

exogenous elections. Tr738; Tr742 (new CD34 and CD36 perform consistently for minority voters); MALC-25.

As with DFW, the minority population (this time also significantly more Asians) grew in the Houston area, and Anglo population declined. But as in DFW, no party has proposed additional single-minority-majority-CVAP districts in the Houston area. Although Plan C285 does create a new HCVAP-majority district, CD29 loses its HCVAP-majority status. Thus, as in DFW, Plaintiffs must rely on proposed coalition districts to meet the first *Gingles* precondition. Defendants contend that Plaintiffs have failed to prove cohesion in the Democratic primaries, and thus cannot meet their burden under the second *Gingles* precondition.

In 2011, several witnesses testified generally about a "Black and Brown coalition" in Houston. *E.g.*, docket no. 1340 at 373 n.52. Congressman Green testified that African-American and Latino communities within his district had worked together to elect Sheriff Adrian Garcia, the first Latino sheriff. Docket no. 1340 ¶ 564. Rep. Senfronia Thompson, an African American, testified that African Americans, Latinos, and Asians work in cooperation together politically. Docket no. 1364 ¶ 503. She testified that she receives Latino support and that she has supported many Latinos. *Id.*

It is generally undisputed that, here, as elsewhere, African Americans and Latinos choose primarily to participate in the Democratic primaries. In Harris County, Dr. Lichtman found that 86.76% of Hispanic and 97.87% of Black voters participated in the 2008 Democratic primaries, and 53.46% of Hispanic and 94.12% of Black voters participated in the 2010 Democratic

primary. Joint Expert Ex. E-3 at 5; *see also* docket no. 1364 ¶ 502 (noting that Murray found "almost zero black population voting in the Republican primaries and very, very little Hispanic population"). It also undisputed that African-American and Latino voters coalesce around the Democratic candidate in the general election, as shown through both lay witness and statistical evidence.

But Dr. Murray and the African-American Congressperson Intervenors were concerned about the C185 configuration in Houston's African-American districts creating "tension," where African Americans and Latinos would compete for control over districts as Latino population increased in the African-American districts. Docket no. 1340 ¶ 566. Dr. Murray testified that such tension is more likely when representatives are not consulted in the drawing of the districts. Tr1284-85. Congressman Green testified that, when one group has a plurality, the two groups can work well together through a "gentle person's agreement" to back candidates from the plurality, but when there is no plurality, tension may develop because both groups want representation. Docket no. 1340 ¶ 567.

Murray agreed that, if Hispanic and African-American populations were balanced about evenly in a district, "you are going to get some tension in Democratic primaries." *Id.* ¶ 566 n.52. He agreed that, in the primary, African Americans tend to vote for African Americans and Hispanics for Hispanics. *Id.*

Dr. Alford notes that in proposed CD34 in Plan C285, the combined BCVAP is at 25% and HCVAP is at 28.6%,

and MALC has not offered primary analysis for this proposed district. He testified,

> If we had no other information, we might assume that it reflected a kind of perfect combined minority district because the population numbers suggest that it's pretty evenly divided between the two groups. If they're politically cohesive, that might be just the right way to draw that district.
>
> We know from the Harris County primary analysis, Dr. Engstrom, that the two groups are not politically cohesive, and we know from the experience in CD33 how that typically would play out. So this is a district that's . . . if it was implemented, likely to be characterized a few years from now as black opportunity district.

Tr1378.

As noted by Dr. Alford, Dr. Engstrom's statistical analysis indicates a lack of Democratic primary cohesion between African-American and Latino voters, with African Americans sharing support for the Latino candidate with Latinos for only two of six candidates in Harris County between 2006 and 2010. Docket no. 307-1 at 16. In several primaries, African-American support for the Latino candidate was lower than "others." Docket no. 307-1 at 17-18. Dr. Engstrom's results are set forth in the following table:

Harris County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	28.0 24.9 - 31.0	39.5 36.1 - 42.7	38.3 36.5 - 40.2

2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	34.8 31.8 - 37.6	43.5 39.0 - 47.9	43.4 40.6 - 46.3
2008 Dem. Primary US Senate (Noriega)	44.1 42.6 - 45.6	73.8 71.2 - 76.4	54.0 52.8 - 55.2
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 26.3 - 28.8	75.8 73.6 - 78.0	30.6 29.5 - 31.7
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	52.7 51.7 - 53.9	87.8 85.9 - 89.7	44.3 43.1 - 45.4
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	37.8 36.4 - 39.2	67.6 64.5 - 70.7	31.1 29.6 - 32.6
2010 Dem. Primary Land Comm'r (Uribe)	69.6 68.2 - 70.9	59.0 55.5 - 62.6	46.3 44.7 - 47.9
2014 Dem. Primary Governor (Madrigal)	1.7 0.2 - 2.9	31.8 29.0 - 34.8	.1 0.0 - 0.3

Dr. Chervenak only looked at one primary election in Harris County, the 2016 HD149 Democratic primary, where he measured support from various groups for the Asian candidate Hubert Vo. He found that all the various groups shared similar levels of support for Vo: African Americans at 56.4%, Latinos at 60.6%, Asians at 62%, and White voters at 55.4%. NAACP-2 at 20. Thus, this does not tell us much about a particular African American and Latino coalition.

While there may not be as much evidence indicating a lack of primary cohesion in Houston as there is in DFW, neither is there much evidence proving primary cohesion.

Considering all the evidence, Plaintiffs have failed to satisfy the burden of proving minority group cohesion in Houston. The § 2 results claim in the Houston area fails.

V. CD23

Several Plaintiffs challenged the configuration of CD23 in Plan C185, arguing that it was racially gerrymandered by applying the "nudge factor," in which Hispanic population and turnout were manipulated to make CD23 appear to be a Latino opportunity district when in fact it was not. The Task Force also asserted a *Shaw*-type racial gerrymandering claim against CD23.

In the § 5 preclearance litigation, plaintiffs asserted retrogression and discriminatory purpose claims. Plan C235 incorporated changes to CD23 that attempted to address the "not insubstantial" claims that CD23 was impermissibly retrogressed from the benchmark in Plan C185. Docket no. 691 at 31. At the time the Court considered adopting Plan C235, the parties disputed whether CD23 was effectively adjusted to avoid retrogression, with MALC and certain other Plaintiffs arguing that its performance was below benchmark levels because in almost all elections, the choice of Hispanic voters did slightly more poorly.[71]

---

[71] The Task Force Plaintiffs stated that CD23 as altered in Plan C226 "restore[d] CD 23 as a Latino opportunity district" and noted that the win-loss record of Latino-preferred candidates was similar to the benchmark. Docket no. 638 at 35. The Task Force stated that "[t]he restoration of CD23 in C226 addresses the Latino Task Force claim of intentional discrimination under the Constitution and §§ 2 and 5 of the Voting Rights Act." *Id.* The Task Force did not assert claims against CD23 in Plan C235, and the Court denied the Task Force's motion for leave to amend to pursue such claims shortly before this trial in 2017.

Dr. Ansolabahere compared the proposed CD23 in Plan C226 to CD23 in the benchmark in February 2012 as this Court was evaluating the proposed compromise plan. Rod-916 (Analysis of CD23 under Plans C100 and C226). He noted that the HCVAP increased from 59.3 to 60.6%, but that performance for Hispanic-preferred candidates decreased by about one-to-two percentage points in every election he studied, with an average reduction of 1.5%, although the number of wins did not change. Although CD23 was better than in Plan C185, he viewed it as reducing ability to elect from Plan C100.

However, because CD23 in Plan C235 maintained comparable win-loss records on various election indices,[72] the Court concluded that it had been sufficiently restored to benchmark performance levels to avoid retrogression, even if the margin of victory slightly decreased. Docket no. 691 at 31-32. Further, because Plaintiffs argued that CD23 in the benchmark was an opportunity district and its performance on the various indices was similar in Plan C235, the Court found that Plaintiffs' § 2 claims were resolved, and the Court also did not need to decide the discriminatory purpose claims related to CD23. *Id.* at 32.

In its Order on Plan C185, this Court found that the Task Force Plaintiffs succeeded on their *Shaw*-type racial gerrymandering claim as to CD23, that CD23 was no longer an opportunity district despite its HCVAP-majority status, and that mapdrawers intentionally discriminated against Latino voters and diluted their vote in violation of § 2 of the VRA and the Fourteenth

---

[72] This included the OAG 10, Dr. Handley's index, and Dr. Engstrom's index.

Amendment through the use of the nudge factor. Docket no. 1390 at 11-32.

MALC, the Rodriguez Joint Plaintiffs, and Congressman Cuellar assert claims against CD23 in Plan C235 on the basis that it did not fully remedy the intentional vote dilution and intentional discrimination behind the district lines in Plan C185. The Rodriguez Joint Plaintiffs contend that CD23 continues to run afoul of § 2 despite the adjustments made in Plan C235. Docket no. 1524 at 15. The Court must thus determine whether CD23 as reconfigured in Plan C235 is a Latino opportunity district and whether the harms inflicted in 2011 are remedied.

First, however, the Court considers Defendants' assertion that these Plaintiffs lack standing to challenge CD23.[73] *See* Docket no. 1526 at 74 n.14. MALC has identified "multiple members of its organization who reside in CD 23 or who have districts within the geographic constraints of CD 23." Docket no. 1532 at 1. MALC notes that it previously identified Rep. King as a resident and voter in CD23 in docket no. 258 and also identified additional MALC members who were residents of CD23. *Id.* at 2. Further, MALC member Poncho Nevarez represents and resides in HD74, which is entirely contained within CD23. MALC-1.

MALC has proven its standing to assert claims against CD23.[74] "[A]n association has standing to bring

---

[73] Between closing argument and their closing briefs, CD23 is the only area in which Defendants raise a specific challenge to the standing of any Plaintiff.

[74] To the extent that other Plaintiffs also assert these claims, the standing of MALC is a sufficient basis for this Court's analysis. *Nat'l*

suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Com'n*, 432 U.S. 333, 343 (1977). First, as noted, at least one MALC member would have standing to sue in his or her own right as a resident of CD23.

Second, the interests sought to be protected—Latino voter strength and representation in Texas's congressional districts—are germane to MALC's purpose. Tr145 (testimony of Rep. Martinez Fischer that MALC looks to develop membership that will take into account the views of the minority community when it comes to public policy and voting rights). Because MALC is an association of Texas House members, Defendants argue that "the configuration of congressional districts is not germane to the organization's purpose." Docket no. 1526 at 74 n.14. Although the configuration of congressional districts is not *itself* MALC's purpose, that is not what the law requires. The interest to be protected need only be *germane* (*i.e.*, relevant) to MALC's purpose, which is a "low threshold"—"the germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the

---

Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth., 389 F.3d 491, 501 n.18 (5th Cir. 2004) ("[W]hen one of multiple co-parties raising the same claims and issues properly has standing, we do not need to verify the independent standing of the other co-plaintiffs."); *see also* docket no. 1365 at 116 n.72 ("[T]he Court rests its analysis of the merits on the standing of LULAC, which covers all of the *Larios* claims in the lawsuit.").

organization's purpose." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010) (quoting *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 148 (2d Cir. 2006)). Here, the configuration of congressional districts overlaps in important ways with MALC's purposes of growing membership and representing Latinos in Texas. MALC's ability to accomplish both of its goals is strengthened by increased Latino political power in congressional districts, even though the strengthening of Latino political power in congressional districts is not itself MALC's purpose. At the very least, MALC's challenges are "pertinent" to the purposes identified by Representative Anchia.

Third and finally, participation of individual MALC members is not necessary and Defendants do not argue otherwise. Accordingly, MALC has standing to assert its claims in CD23, and as a result, the Court finds it unnecessary to conduct a detailed standing analysis for other Plaintiffs.[75]

---

[75] The Fifth Circuit has recognized various Supreme Court decisions that give courts "license to *avoid* complex of questions of standing in cases where the standing of others makes a case justiciable." *Nat'l Rifle Ass'n of Am. v. McGraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013) (emphasis original) (citing *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L.Ed.2d 248 (2007) and *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986). The Fifth Circuit has cautioned, however, that "it does not follow that these cases permit a court that *knows* that a party is without standing to nonetheless allow that party to participate in the case." *Id* (emphasis original). The procedural posture of this case and Defendants' standing challenge permits the Court to rest its analysis of multiple plaintiffs' claims on the standing of a single plaintiff. This case has been pending for six years, but after Defendants challenged

The parties are in agreement that the Hispanic voters in CD23 have a right under § 2 that the State must accommodate, but they disagree on whether CD23 as configured in Plan C235 is a Latino opportunity district. In Dr. Alford's March 2014 Supplemental Report (D-424), he opined that CD23 "is a politically competitive district that nonetheless provides an opportunity for Latinos to elect their candidate of choice." D-424 at 26; *id.* Table 6 (in

---

standing at the motion to dismiss stage, they have not formally re-asserted their challenges by seeking summary judgment or specifically seeking dismissal as to any particular plaintiff on specific grounds. Thus, so long as a single party has standing to assert a particular challenge, the Court will assess the record as to that claim, regardless of whether other plaintiffs have standing to assert the same claim.

However, the Court notes that, even if MALC lacked standing here, LULAC also has a strong case for associational standing. This Court has admitted a declaration from LULAC's Texas State Director, Elia Mendoza, who states that LULAC has councils in Maverick and Val Verde Counties (which are in CD23), that each council has an officer and a contact person, and that there are multiple LULAC members who are registered voters in CD23 (though none are identified by name). Docket no. 1365 at 118 (2011 House Plan Opinion); docket no. 1342-1 (Mendoza declaration). In addition, Congressman Cuellar is the elected representative of CD28, which borders CD23 to the southeast, but is not a voter in CD23. However, elected officials may have standing to protect their interests as district representatives, including "the 'ability to protect their continued tenure,'" and restructuring of CD23 could affect Cuellar's district. *LULAC Council No. 4434 v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989) (quoting *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1572 (N.D. Ill. 1988)); *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 844 (5th Cir. 1993). In any event, the Court again reiterates that it need not decide this question of Congressman Cuellar's standing individually because he asserts the same claims as MALC, which has standing for the reasons described above.

C100 CD23 was 2 Democrat wins, 4 Republican wins; in C185 it was 0 Democrat wins, 6 Republican wins; in C235 it was back to 2 Democrat wins, 4 Republican wins). He asserts that, throughout its modern history, CD23 has been a highly competitive congressional district, producing victories for Hispanic Republicans during Republican tides, and producing victories for Hispanic Democrats during Democratic tides. He further notes that, if opportunity requires a demonstrated opportunity for Hispanic voters to elect a candidate of choice, then that has been empirically demonstrated for CD23 because in 2012, Pete Gallego defeated incumbent Francsico Canseco with 50.3% of the vote.

Dr. Alford's more recent analysis reflects an endogenous success rate of 33% (1/3 elections) and a success rate of 12% (3/25) on reconstituted statewide elections. D-878 at 16-17, 20; Tr1431 (Alford). Dr. Alford agreed that the district will more often than not elect the Anglo-preferred candidate in endogenous elections, favors the Anglo-preferred candidate in 88% of exogenous elections, and is designed to tilt in favor of Anglo-preferred candidates. Tr1389, 1402, 1430-31. But he still believes that CD23 provides the opportunity required by § 2. Plaintiffs contend that CD23 does not perform for Hispanic voters by electing their candidate of choice in a legally significant number of elections.

A majority-minority district must provide "real electoral opportunity" to the minority group in order for the § 2 right to be fulfilled. *See LULAC*, 548 U.S. at 428. "A 'real opportunity' is not a guarantee of success, as the Court is mindful that § 2 does not guarantee electoral success for minority-preferred candidates." *Perez*, 2017 WL 1787454, at *8 (citing *LULAC*, 548 U.S. at 428). CD23

satisfies § 2 if it offers Hispanic voters the real opportunity to elect their candidate of choice. We are in a unique position to evaluate that question with actual election data because of the peculiar posture of this case. Three endogenous elections have taken place in the district under the Plan C235.

When the current configuration of CD23 was adopted, the HCVAP was 61.3%, an increase from 58.5% HCVAP in the 2011 plan. The most recently available ACS five-year survey data (2011-2015) places the HCVAP at 62.1%. The SSVR in CD23 was stable across all three elections for which C235 has been in place: 55.6 , 55:9, and 55.3%, respectively.

From the 2012 to the 2016 election, Hispanic turnout increased from 46% to 48.2% of the turned-out vote, with a dip in the 2014 midterm election to 40.9%. This increase in Hispanic turnout led to a decrease in the vote gap between Hispanic and non-Hispanic voters from 16,075 in 2012 to 8,506 in 2016. Looked at another way, it reflects a 20.7% increase in the number of Hispanic voters and a 10.7% increase in the number of non-Hispanic voters.

Dr. Ansolabehere analyzed the Democratic vote totals in the areas moved in, moved out, and kept in the CD23 when compared to C185. He concluded that the areas that were brought into the district, while Democratic, contained insufficient votes to overcome the vote totals for Republicans in the areas that were kept in the district. This left Democrats with a vote deficit of approximately 8,000 votes. Rod-955 (Ansolabehere report) at 15. Such analysis has limited value for reviewing CD23's performance because we can look to the actual election results in three endogenous elections, which in this case

demonstrate the opportunity Hispanic voters have to elect their candidate of choice in CD23.

The Hispanic candidate of choice—Democrat Pete Gallego in all three elections—was elected in 2012, but was narrowly defeated by African-American Republican Will Hurd in 2014 and 2016. Gallego won in 2012 by a margin of over 9,000 votes. Gallego's margin of defeat in 2014 was about 2,000 votes and his margin of defeat in 2016 was about 3,000 votes. Both Dr. Engstrom's bivariate and Dr. Alford's multivariate ecological inference analyses of CD23 demonstrate that Gallego lost Hispanic vote share from 2012 to 2016. Engstrom's bivariate analysis shows his Hispanic support declining from 86.9 to 82%. Alford's multivariate analysis shows Gallego's Hispanic support declining from 82.6 to 76.2%. Dr. Alford testified that a 4% drop in support among Hispanics, smaller than either Engstrom or Alford's analyses demonstrate, would result in a more than 3,000 vote decrease for Gallego. Had Gallego retained his support among Hispanic voters, particularly in an election in which Hispanics were also gaining vote share over 2012, Gallego would have defeated Rep. Hurd.[76] The

---

[76] Dr. Alford disagreed with Dr. Flores's conclusion that Gallego lost because of increased racial polarization in the district. Tr1400. Dr. Alford noted that Gallego's Anglo support increased from 23.9 in 2012 to 26.85% in 2014, which is not unexpected since he was the incumbent, but Hispanic turnout dropped more dramatically than Anglo turnout in the non-presidential election year. Tr1393-96. Thus, although both Latino and non-Latino support for Gallego increased, the relative proportions in the electorate that are Hispanic and Anglo are different in that midterm, and "it's an electorate that's less helpful to an Hispanic candidate," such that Gallego loses. Tr1397. Alford further noted that, in 2016, Gallego is not the incumbent, and Hurd is. Hurd is getting 74.8% of the Anglo vote; Gallego is down at 22.4%.

competitiveness of these elections is sufficient to find that CD23, as currently configured, is a Hispanic opportunity district.

The exogenous elections over the previous three cycles show less success for the Hispanic candidate of choice in the district. Under the current plan, the Hispanic candidate of choice was successful in three of twenty-five exogenous elections in CD23.[77] The Rodriguez Plaintiffs contend that "an abysmal 12% success rate is far below any of the indices this Court cited in its discussion of

---

Gallego is at 76.2% Hispanic support and Hurd at 19.1%. Tr1394. In terms of Hispanic support, Gallego is down from 2014, which Alford did not think was unusual because Gallego was running as a challenger rather than as an incumbent and Hurd, the incumbent, has had some time to move from being a candidate to being someone who actually represents the district. Tr1394. Although the proportion Hispanic in the turned-out vote went up by a couple of percentage points, Gallego still lost, and that is where Alford felt the EI analysis explained why—Gallego's support among *both* Hispanics and Anglos dropped. Tr1398-1400. Alford felt this was not increased racially polarized voting because Gallego was defeated in 2014 in an election when his level of support increased in both Anglos and Hispanics, and he was defeated again in 2016 when his level of support decreased in both Anglos and Hispanics. Tr1400-01. Thus, Alford indicated, the 2014 defeat was due to a decrease in relative turnout, and the defeat in 2016 was due to a decrease in Hispanic cohesion in support of Gallego (as well as a decrease in Anglo support). *See also* Tr1065 (Ansolabahere) (noting that if there is a small difference in turnout in the favor of the Hispanic-preferred candidate, then the district polarization will kind of help cement that as a Hispanic district, but if there is a small deficit in the opposite direction, that will help cement it as a non-Hispanic district).

[77] Korbel's analysis showed that CD23 performed in exogenous elections 0/10 in 2010, 0/5 in 2012, 0/12 in 2014, and 2/8 in 2016. Tr726; Tr743; MALC-25.

benchmark CD23" and, unlike CD23 in Plan C100, the endogenous success rate is also low (33% compared to 66% in Plan C100). Docket no. 1254 at 16. But exogenous elections are far less probative than the actual endogenous election data we have. We have also rejected a pre-set success rate for the minority preferred candidate in exogenous elections. *Perez,* 2017 WL 1787454, at *8. Such a requirement is not compatible with the Supreme Court's directives that § 2 requires a searching, practical inquiry specific to the facts of each case. *Id.* We know that CD23 may still perform for minority-preferred candidates even when its performance on statewide indices is equal to or less than 50%. Although a 33% endogenous success rate is undoubtedly less than the 66% we considered to provide opportunity in CD23 in Plan C100, as Dr. Alford noted, with only three endogenous elections, one change in win/loss results in a large change in percentage. And the fact that endogenous wins are less than 50% is not dispositive.[78] The evidence indicates that Latinos *can* win elections in the district, and whether they can win in the future is largely within their control.

On the whole, CD23 is a highly competitive district for U.S. Representative candidates. Hispanics have an opportunity to elect a candidate of their choice where merely small changes in cohesion, turnout, candidate quality, or a host of other factors could tip the election in their favor. Section 2 is not meant to be a guarantor of political success and we will not further tinker with the boundaries of CD23 to achieve that end.

---

[78] "The circumstance that a group does not win elections does not resolve the issue of vote dilution." *LULAC,* 548 U.S. at 428.

Last, the Court considers whether the intentional harms found with regard to Plan C185 continue in Plan C235, despite the changes to the district.[79] In finding that mapdrawers applied the "nudge factor" in CD23 in Plan C185, the Court noted that the Legislature intentionally split Maverick County and the City of Eagle Pass to exclude politically active Hispanics who would not support Canseco, increased the turnout gap between Latinos and Anglos, and increased SSVR while simultaneously decreasing Latino cohesion (and performance) by selectively including high SSVR districts with worse performance for Latino-preferred candidates.[80] The Court found that the increases in SSVR and HCVAP were not intended to and did not maintain or improve Latino voting strength. Docket no. 1390 at 22.

In Plan C235, no changes were made to El Paso or the northern border, but Maverick County was made whole and placed within CD23, and Atascosa County was made whole and placed within CD28. Changes were also made to CD20, CD23, and CD28 in Bexar County. The Task Force, one of the principal Plaintiffs groups pursuing the nudge factor claim in CD23, stated that "[t]he restoration

---

[79] As to the *Shaw* claim, to the extent race predominated in Plan C185, the district was redrawn in Plan C235. Even if race predominated in that redrawing, changes to the district were necessary to address intentional discrimination, and thus any use of race served a compelling state interest.

[80] As the Court noted, although Downton claimed to be trying to include more Hispanic Republicans, his method could also include precincts with low Hispanic turnout and high Anglo Republican turnout or higher Anglo bloc voting levels, and he failed to consider the Hispanic incumbent's chances in the Republican primary. Docket no. 1390 at 21 n.19.

of CD 23 in C226 [which became C235] addresses the Latino Task Force claim of intentional discrimination under the Constitution and §§ 2 and 5 of the Voting Rights Act." Docket no. 638 at 35.

Dr. Ansolabahere looked at the alterations made to CD23 in Plan C235 and the available information at the time to determine how the district was being reconfigured and if the changes "were fixing specific problems" in terms of increasing turnout or SSVR. Tr1060-61. He noted that although HCVAP was increased, the actual number of Spanish surnamed registered voters barely increased. Tr1061; Rod-955 ¶ 27 (the changes resulted in a net increase of only 243 SSVRs). He noted that this was an indication that maybe the areas being moved in were not going to perform to the level that they needed to in terms of participation. Tr1061. He further found that the areas moved into CD23 had lower turnout than the areas moved out of CD23, and that the movement of lower turnout areas into CD23 did not improve, and may have worsened, the electoral opportunities afforded to Hispanics in the district. Rod-955 ¶¶ 28, 30.

Dr. Ansolabahere acknowledged that Plan C235 fixed the Maverick County split and moved the entire County back into CD23, and that both HCVAP and SSVR were increased. Further, although he notes that areas moved into CD23 had lower turnout than areas moved out, his turnout analysis looked only at total turnout, not Hispanic or SSVR turnout, and did not compare Hispanic and non-Hispanic turnout differences. Tr1153.[81]

---

[81] Dr. Ansolabahere looked at 2010 election turnout because that was the data available to the mapdrawer, but he agreed that

Dr. Flores's analysis examined the change in SSVR in Latino opportunity districts from 2008 to 2016, and found that the SSVR decreased slightly in CD23 (-0.2%). TF-20 at 3. But he found that it similarly decreased in CD20 (-0.5%) and CD35 (-0.9%). TF-20 at 2. Flores also found that "Latinos were more successful in increasing their number of votes cast when compared to non-Latino voters" but they "could not overcome the total turnout numbers of non-Latino voters." TF-20 at 7. He also found, based on the difference in turnout rates between Latinos and non-Latinos in the 2012 and 2016 general elections, that "[a]lthough Latinos have made gains closing the turnout gap in 2016 compared to 2012, the participation gap is still substantial at 15.8%." TFX-20 at 7-8.

In his conclusions, Dr. Flores notes that he previously pointed out the "difficulties that Latino candidates of choice would encounter because of the manner in which CD 23 was constructed by the Texas Legislature" in terms of turnout, and that Plan C235 "made some modifications to CD23 in Bexar County as an interim remedy." TF-20 at 12. He then states, "However, since 2012 the challenges facing Latino voters in CD23 have worsened with the increased level of bloc voting by non-Latinos against the Latino candidate of choice." *Id.*[82] But

---

Defendants' 2016 election turnout analysis showed an overall increase in turnout. Tr1154-57; DX-808.

[82] As noted above, non-Latino bloc voting actually decreased between 2012 and 2014. Dr. Engstrom's analyses show that, between 2012 and 2014, both Latino and non-Latino support increased for Gallego. TF-19. In addition, both Anglo support and Latino support for the Hispanic-preferred candidate were higher in 2012 under Plan C235 than they were in 2010 under Plan C100. In 2010, Engstrom found 84.7% Latino and 18.1% non-Latino support for Rodriguez.

this fails to tie any of the current problems he identifies in CD23 to specific lines drawn in Plan C185. It is not enough to point to problems with CD23 in Plan C185 and problems with CD23 in Plan C235, without connecting the problems in Plan C235 to decisions made in Plan C185 and demonstrating specific continuing harms flowing from Plan C185. While Flores shows that Latinos continue to have a turnout gap compared to Anglo voters, that fact is true in most areas, if not statewide, and there is simply no evidence for the Court to conclude that the turnout gap in Plan C235 is the result of intentional discrimination in the mapdrawing process or carryover from Plan C185. And while the district may not perform as desired for Hispanic-preferred candidates, the Court finds no persuasive evidence that the lack of performance is the result of intentional discrimination in either 2011 or when the interim map was drawn in 2012.

Based on the foregoing, the Court finds that no changes are required to CD23.

VI. CD35 and CD27

The Rodriguez Plaintiffs contended that CD35 in Plan C185 was an impermissible racial gerrymander in violation of the *Shaw*-line of cases. And several Plaintiffs asserted that the removal of Nueces County from the "envelope" of South and West Texas Latino opportunity districts violated § 2 because Nueces County Hispanic

---

Docket no. 307-1 at 25. In 2012, he found 86.9% Latino and 20.8% non-Latino support for Gallego. TF-19. Engstrom also estimated Latinos at 40.77% of the turned-out vote in 2010, while Flores found Latinos to be 46% of the turned-out vote in 2012. Docket no. 307-1 at 25-26; Flores Table 4 (92,997 Latino votes cast in 2012); Flores Table 5 (109,072 non-Latino votes cast in 2012).

votes were deprived of their opportunity to elect candidates of their choice. Hispanic voters in Nueces County who had been in benchmark Latino opportunity district CD27 asserted § 2 and Fourteenth Amendment claims based on the reconfiguration of CD27 in Plan C185, which placed them in an Anglo-majority CD27 oriented toward the north that was unquestionably no longer a Latino opportunity district.

The Court agreed that CD35 was an impermissible racial gerrymander because race predominated in its creation without furthering a compelling state interest. Although a new Latino opportunity district was required in South and West Texas, the Court found that mapdrawers' placement of significant population from Travis County into CD35 was not to substantially address the § 2 requirement, but to use race as a tool for partisan goals. Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition, which mapdrawers knew, and placement of CD35 there was not to address § 2 concerns, but to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25).[83]

---

[83] Relatedly they intended that the CD25 incumbent, Lloyd Doggett, would lose any subsequent election in either CD25, which became a safe Republican district, or in a CD35 primary. Accordingly, they were willing to accommodate requests from Hispanic Democrat legislators from Bexar County to weight the district more heavily toward Bexar County. The result was the least compact district in the plan, designed not for a cohesive Hispanic voting bloc, but to allow Bexar County Hispanics to control elections, hopefully ousting Doggett, an Anglo, if he chose to run in the district. Defendants' plan

Simultaneously, mapdrawers removed Nueces County and its substantial Hispanic population from the South/West Texas configuration of districts, and placed it in an Anglo-dominated district going northward, not because they wanted these Hispanic voters to have influence in CD27 or because their rights could not be accommodated without other voters' § 2 rights failing to be accommodated, but because they would not vote for the newly elected Anglo Republican incumbent.[84] Placing

---

was not realized, however, since Doggett secured re-election in CD35 despite it being designed to elect a Latino from Bexar County.

Several Plaintiffs also brought intentional discrimination claims based on the alleged intentional destruction of CD25 as a functioning crossover district. Because the *Shaw* equal protection violation would require district lines to be redrawn in Travis County, the Court did not reach that specific claim. Relatedly, Defendants have argued that Plaintiffs cannot establish a § 2 claim in Travis County related to the intentional destruction of alleged crossover district CD25 because the Court found no racially polarized voting in Travis County such that a crossover district would not be required to be drawn there. That argument misunderstands the nature of Plaintiffs' *Bartlett* claim, however. No party has asserted that § 2 requires a crossover district to be created in Travis County. Rather, certain plaintiffs are arguing that the intentional destruction of an existing crossover district, when done with racially discriminatory purpose, violates the Fourteenth and Fifteenth Amendments. While § 2 does not require states to draw crossover districts, a remedy for the purposeful destruction of an existing crossover district could include recreating the destroyed crossover district.

[84] Even Defendants' expert Dr. Alford agreed in the 2011 trial that CD27 was flipped from a Latino opportunity district to an Anglo-majority district to protect a candidate who was not preferred by the Hispanic voters. Tr1829, Tr1832, Tr1837. In *LULAC v. Perry*, 548 U.S. 399, 441 (2006), the Supreme Court noted that "incumbency protection can be a legitimate factor in districting," but "not all of [its forms are] in the interests of the constituents." Thus, "If . . .

them in the new Anglo-dominated CD27 would ensure that Anglo bloc voting would prevent them from electing their preferred candidate. Thus, although these Nueces County Hispanic voters had a § 2 right, had been in an opportunity district, and could have remained in one, they were intentionally deprived of their right to elect candidates of their choice.

In sum, the Court found that the Legislature violated § 2 in both result and intent, as well as the Fourteenth Amendment, by racially gerrymandering CD35 to replace CD25 and simultaneously impermissibly trading the § 2 rights of Nueces County Hispanic voters for those in Travis County, who lacked a § 2 right to a Latino opportunity district. The Court found that seven Latino opportunity districts were required in South and West Texas, and while the Legislature enjoys some discretion in creating such districts and not every voter who demonstrates a § 2 right has a corresponding right to be placed into an opportunity district,[85] the Legislature

---

incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. . . . This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters." *Id.*

[85] In its Order on Plan C185, this Court stated that, "Where the rights of voters who have demonstrated § 2 violations can be accommodated through the use of compact districts that do not subordinate traditional redistricting principles more than necessary to address the § 2 liability, those voters' § 2 rights must be accommodated." Docket no. 1390 at 56. This was not meant to imply that any voter with a § 2 right must be placed into a § 2 district, or that Nueces County Hispanics would have had a right to be included in a Latino opportunity district under any circumstances. Rather, Plaintiffs demonstrated that seven compact Latino opportunity

intentionally did not substantially address the § 2 violation.

The exact same configuration of CD35 and CD27 remains in Plan C235. At the time the Court adopted Plan C235 as the interim plan, it did not alter the configuration of CD35 because it did not have the benefit of the full record and did not find that race predominated. In light of all the evidence and a full consideration of the record, the Court found that its preliminary conclusion concerning race predominance was erroneous. In conducting strict scrutiny review, the Court then determined that the placement of CD35 in Travis County was far from benign.

In addition, at the time the Court adopted Plan C235, it stated that the failure to place Nueces County Hispanics in a South Texas district did not diminish Hispanic voter opportunity for § 2 effects purposes, since whether they were included or not, no additional compact Latino opportunity district could be drawn. While this remains true, the Court's opinion on Plan C185 did not base its holdings on the mere failure to include Nueces County Hispanics in a § 2 Latino opportunity district, nor

---

districts could be drawn and that § 2 required seven such districts, and the Legislature was required to accommodate those rights. If the Legislature had substantially addressed the requirement for seven Latino opportunity districts while still not including Nueces County, and there was no evidence of improper intent, this would be a different case, and Nueces County Hispanics would not have a right to inclusion in a Latino opportunity district. That is why, at the time the Court adopted the interim maps and had not yet found improper intent with regard to CD27 and CD35 and improper racial gerrymandering in CD35, it concluded that Nueces County Hispanics did not have a right to be placed into a Latino opportunity district. However, with the benefit of examination of the full record, that is not the case.

on a § 2 effects claim based on the failure to create additional Latino opportunity districts, the claim to which that statement was directed. Rather, the Court found that the Legislature intentionally diluted the vote of Nueces County Hispanics who would not support incumbent Farenthold, while simultaneously trading their § 2 rights to Travis County voters without a § 2 right.

The fact that seven HCVAP-majority districts were drawn in South and West Texas and that no more could be drawn simply does not resolve the issues. The Legislature racially gerrymandered to create the seven districts, yet *intentionally* failed to substantially address the § 2 violation that required those seven districts. The same facts exist and the same harms continue. Updated evidence indicates that there still is no Anglo bloc voting in Travis County, yet Travis County population makes up almost 31% of CD35. Tr1167 (Ansolabahere); JX-100.2. Using 2010 Census data, there are 215,626 individuals from Travis County included in CD35, about 140,800 of whom are Hispanics. JX-100.2. Dr. Ansolabahere testified that 220,000 Nueces County Hispanics are stranded in CD27, a district with 44.6% HCVAP. Tr1162-63.[86]

The Rodriguez Plaintiffs maintain their *Shaw*-type claim against CD35, and their intentional discrimination claim related to the destruction of CD25. Docket no. 1524 at 3 & n.8.[87] The Rodriguez Plaintiffs note that the lines of CD35 have not changed, that it remains the least compact

---

[86] Nueces County is now 57.55% HCVAP; there are 218,400 Hispanics in Nueces County, 205,990 Hispanic citizens, and 142,230 HCVAP. Tr1163; D-702.

[87] Other Plaintiffs, including MALC and the NAACP Plaintiffs, also maintain claims related to the intentional destruction of CD25.

district in the state, and that the same population suffers from the State's unjustified race-based classification in Plan C235. Docket no. 1254 at 13. The Rodriguez Plaintiffs also correctly point out that discriminatory intent is not an element of a *Shaw*-type racial gerrymandering claim, and thus the only inquiry remains whether race predominated in the decision to place a significant number of voters within and without the district and, if so, whether strict scrutiny is satisfied. Because the lines of CD35 remain identical to the lines in CD35, Rodriguez Plaintiffs note that the evidence is largely the same. Docket no. 1254 at 14.

Defendants contend that, although this Court found CD35 to be an unconstitutional racial gerrymander in Plan C185 and CD35 remains unchanged in Plan C235, there is no unconstitutional racial gerrymander in Plan C235 because the Legislature "did not draw the boundaries of any district" and "did not make a 'decision to place a significant number of voters within or without a particular district.'" Docket no. 1526 at 85. As discussed above, this argument lacks merit, as it improperly focuses on the re-enactment of a plan containing CD35, rather than the decision as to which voters to place within and without the district at the time that decision was made (in 2011).

Although Plan C235 was enacted in 2013, the decision as to which voters to include within CD35 was made in 2011, and that remains the proper time for evaluating the district under *Shaw*. Otherwise, a Legislature could always insulate itself from a *Shaw*-type challenge simply by re-enacting its plan and claiming that it made no decisions about who to include in the district at the time of re-enactment. There is no evidence that the Legislature

again considered in 2013 which persons to include within CD35 (and Defendants deny that any such decisions were made in 2013), or that it considered any evidence to provide a strong basis in evidence that did not previously exist in 2011. Rather, as the Court found above, it maintained these aspects of Plan C235 in spite of the possibility that such infirmities remained. Thus, this Court's prior findings and conclusions concerning CD35 remain equally applicable to Plan C235.

With regard to the Nueces County and CD27 claims,[88] the Court found that these Hispanic voters were intentionally deprived of their opportunity to elect a candidate of their choice, which they likely would have done in the next election given that Hispanic turnout is greater in presidential election years, and that their rights were essentially traded to Hispanics in Travis County without a § 2 right. There is no evidence that the Legislature engaged in any meaningful deliberation in 2013 to cleanse away such discriminatory intent, and in fact they intended to maintain any such discrimination, purposefully intending to deprive plaintiffs of any remedy.[89]

---

[88] MALC, the Perez Plaintiffs, the Quesada Plaintiffs, LULAC, and the Rodriguez Plaintiffs maintain claims against CD27 in Plan C235 on behalf of Nueces County Hispanic voters. MALC's membership includes Abel Herrero, who represents and lives in HD34 in Nueces County. MALC-1.

[89] Plaintiffs' most recent demonstration plans split Nueces County to accommodate the Legislature's goal of protecting incumbent Farenthold within CD27. All of Nueces County can be placed into a Latino opportunity district, but the county is split to place Farenthold in an Anglo-majority district. To the extent such a split might be objected to as failing to respect county boundaries, that

Therefore, the Court holds that the Plan C235 configurations of CD35 and Nueces County/CD27 remain violations of § 2 and the Fourteenth Amendment and must be remedied.

Plan C235 Summary and Conclusions

In Part II, the Court concludes that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged. The discriminatory taint was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and infact intended any such taint to be maintained but be safe from remedy. The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.

In Part IIIA, the Court concludes that Plaintiffs' § 2 results claims in the DFW area fail for lack of proof of African-American and Hispanic cohesion. In Part IIIB, the Court finds that the intentional discrimination found in DFW in Plan C185 is remedied in Plan C235, and that Plaintiffs failed to prove that any alleged cracking and packing that remains in DFW was intentionally dilutive.

In Part IV, the Court concludes that Plaintiffs' § 2 results claims in the Houston area fail for lack of proof of African-American and Hispanic cohesion.

In Part V, the Court finds that CD23 is a Latino opportunity district and there is no evidence of intentional discrimination/dilution.

---

traditional redistricting principle is not being subordinated to race, but to the Legislature's goal of protecting Farenthold.

In Part VI, the Court concludes that the Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment. These statutory and constitutional violations must be remedied by either the Texas Legislature or this Court.

It is therefore ORDERED that the Office of the Attorney General file a written advisory within three business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered.

If the Legislature does not intend to take up redistricting, the Court will hold a hearing to consider remedial plans beginning on **September 5, 2017 at 8:30 a.m.** in Courtroom 1. In preparation for the hearing, the parties must take immediate steps to consult with their experts and mapdrawers and prepare statewide congressional plans that remedy the violations found in CD35 and CD27 yet minimize the effect on adjoining districts.

The parties must confer and address objections and concerns, to the extent possible, prior to the hearing. If both sides agree upon a remedial plan, they should notify the Court, but the hearing will nevertheless proceed so the parties can present the plan on the record. If the parties cannot agree, they should be prepared to offer, support, and defend their proposed remedial plan(s) at the hearing. Plaintiffs and Defendants will be permitted to offer up to four alternative remedial plans per side, and Plaintiffs may (but are not required) to jointly offer plan(s). The plaintiffs who asserted and prevailed on their claims against CD35 and Nueces County/CD27 (MALC and the Rodriguez plaintiffs (proceeding jointly with the LULAC and Perez plaintiffs)) should take the lead in

drawing and proposing any remedial plans, and the remaining plaintiffs (NAACP, Latino Redistricting Task Force, Congressman Cuellar, and the Quesada plaintiffs) may participate in an advisory role and assert any objections or concerns they may deem appropriate.

The parties should consult with Texas Legislative Council, to the extent necessary, to upload their proposed remedial plans into DistrictViewer and ensure that all relevant data is available to all parties and the Court. If the parties intend to rely on data or analysis that is not available through TLC, they must provide that data to all other parties as soon as that data is available.

It is further ORDERED that Texas Legislative Council staff be present at the remedial hearing for technical assistance in the parties' presentation of their proposed plans through DistrictViewer or other available means.

Because this order only partially addresses the issues herein – the violations in C235 – it is interlocutory. The Court bifurcated the remedial phase, which will commence as scheduled herein. The Court must also address the alleged violations in H358 and, if necessary, a remedial plan for the Texas House.

SIGNED this 15th day of August, 2017.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX C

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-Cv-360
	§	
GREG ABBOTT, ET AL.	§	

AMENDED ORDER*

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

Circuit Judge Smith, dissenting

XAVIER RODRIGUEZ, District Judge and ORLANDO L. GARCIA, District Judge:

This Order addresses Plaintiffs' claims against the plan for the United States House of Representatives ("congressional plan" or "Plan C185") enacted by the Texas Legislature in 2011, following a full trial on the

claims.[1] Plaintiffs mount both statewide claims[2] and regional claims, specifically in the South/West Texas area, Dallas-Fort Worth area, and Houston area, under § 2 of the Voting Rights Act ("VRA") and the Fourteenth Amendment to the United States Constitution.[3]

---

* This Order clarifies the March 10, 2017 Order (docket no. 1339) in the following respects: (1) On page 5, the Court notes that whether Plaintiffs are continuing to be harmed by violations found with regard to CD23 remains undecided; (2) On page 72 footnote 67, the Court clarifies that the Court's holding that the Task Force Plaintiffs failed to establish a § 2 results claim based on the failure to draw a Latino opportunity district in DFW does not preclude Plaintiffs who have pleaded such a claim from pursuing their § 2 results claims based on the failure to draw an additional Latino opportunity district in DFW in Plan C235; (3) On page 76, the Court clarifies that it does not decide whether post-enactment population projections such as Fairfax's can or should be used to evaluate *Gingles* results claims.

[1] This Order is designed to be read in conjunction with the Court's fact findings, which are issued separately.

[2] Plaintiffs assert statewide claims under § 2, which the Court considers in terms of whether Plaintiffs have shown that more minority opportunity districts were required than were included in Plan C185 and whether minorities have proportional representation. However, because the analysis necessarily focuses on whether additional districts could have been drawn in specific areas, the Court finds that conducting the analysis in terms of specific geographic areas is necessary.

[3] Plaintiffs' Fifteenth Amendment and partisan gerrymandering claims were disposed of prior to trial. Docket no. 275, 285. This Court granted summary judgment on the Fifteenth Amendment claims, holding that the law does not recognize a claim under the Fifteenth Amendment for vote dilution. Docket no. 275 at 17. On the political gerrymandering claims, the Court found that the claims were justiciable, but because Plaintiffs had not identified a reliable standard by which to measure the redistricting plan's alleged burden on their representational rights, the Court was required to grant

Before turning to the merits, the Court will again explain why the 2011 plan claims are not moot and a determination on the merits of those claims is required. This Court thoroughly explained its reasoning in its September 6, 2013 Order (docket no. 886). Specifically, in rejecting Defendants' argument that the 2011 plans posed no threat and any order on those plans could provide no effectual relief, the Court reasoned: (1) it was Defendants' burden to prove mootness; (2) Defendants failed to meet their burden of demonstrating that the conduct alleged to violate § 2 and the Constitution with regard to the 2011 plans could not reasonably be expected to recur; (3) the fact that a challenged law is amended does not alone moot the underlying claim unless the law has been sufficiently altered so as to present a substantially different controversy; (4) the 2013 plans are heavily derived from the 2011 plans, and Plaintiffs contend that many of the alleged violations of the VRA and the Constitution initially enacted in 2011 persist in the 2013 plans, though some perhaps to a lesser degree; (5) although the new plans may disadvantage Plaintiffs to a lesser degree, they disadvantage them in the same fundamental way such that Plaintiffs are still suffering injury from the 2011 plans, even if they are technically repealed; (6) there is no indication that the Legislature would not engage in the same conduct that Plaintiffs assert violated their rights in upcoming redistricting cycles; (7) because Texas refused to concede the illegality of any conduct, a dispute remains

---

judgment on the pleadings pursuant to Supreme Court precedent. Docket no. 285 at 19-22. *But see Whitford v. Gill*, 15-cv-421-bbc, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016) (finding for plaintiffs on political gerrymandering claim).

over the legality of the challenged practices and there is no assurance that the conduct will not recur, and Plaintiffs maintain a personal stake in the controversy; and (8) there remains the possibility of declaratory and equitable relief under § 3(c) for some claims. All three members of this Court agreed with this reasoning.

However, after the Fifth Circuit issued its decision in *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015), in which the Court stated that the 2011 Senate Plan lawsuit had become moot, Defendants again argued that the 2011 House and congressional plan claims were moot. Docket no. 1310. Defendants argued that the Fifth Circuit's mootness conclusion was necessary to its decision that Texas waived its opportunity to seek vacatur of this Court's interim-relief orders in light of *Shelby County v. Holder*, and that the Fifth Circuit's holding "bears directly on this Court's jurisdiction over claims against the Texas Legislature's 2011 House and congressional redistricting plans." Docket no. 1310 at 23-24. "At the very least," Defendants argued, "*Davis* implies that the Plaintiffs' claims are moot if they challenge districts that were, like Senate District 10, modified by the Court and later adopted in modified form by the Legislature." *Id.* at 25. However, *Davis v. Abbott* does not change the Court's conclusion that most of the 2011 plan claims are not moot.

Davis v. Abbott was not a decision about mootness; it concerned whether the plaintiffs in the 2011 Senate Plan case were prevailing parties entitled to fees and costs. It did not announce a new rule of law or change the legal landscape concerning mootness. Thus, the only basis upon which it could change this Court's prior conclusions and bind this Court on mootness is if it is factually indistinguishable from this case. But it is not.

As a preliminary matter, the Court notes that the case against the 2011 Senate Plan was not consolidated with the House and congressional plans, and it remained a separate case (5:11-CV-00788). It also involved a very limited set of claims, unlike the House and congressional plan cases. At the interim remedy stage, the proposed compromise plan[4] approved by this Court under the applicable standard set forth in *Perez v. Perry* resolved all of the plaintiffs' claims. *See* docket no. 190 (final judgment noting that Plan S172 "restored [Senate] district 10 to near benchmark configuration and remedied the constitutional infirmities being asserted"). Plaintiffs *agreed* that the interim Plan S172 did not violate the VRA or the Constitution. Thus, when the Legislature adopted that plan in 2013, no plaintiff was complaining that infirmities remained in the plan or alleged that they were still suffering injury from the repealed 2011 plan, and no plaintiff sought to amend their pleadings to pursue § 3(c) relief. When the Fifth Circuit decided that the 2011 plan claims were moot, it was therefore operating under substantially different facts, and it was *not* addressing the House or congressional plan claims when it referred to "the lawsuit" becoming moot.

In this case, in contrast, numerous alleged infirmities from the 2011 plans remained in the interim plans that Plaintiffs contended were continuing to injure them. Unlike in the Senate plan, many asserted VRA and constitutional infirmities were *not* remedied in the interim

---

[4] The plan was submitted by the plaintiffs, and the defendants indicated in open court that they had no objection to entry of an order directing that Plan S172 be used on an interim basis. Docket no. 147 at 2.

plans, and thus the injuries were alleged to persist in the 2013 plans. Thus, there was not only a possibility that Defendants would continue to engage in conduct that Plaintiffs claimed violated the VRA or the Constitution, Defendants were continuing to engage in exactly such conduct when they adopted the interim plans in 2013. The fact that this Court finds that mapdrawers acted with an impermissible intent to dilute minority voting strength or otherwise violated the Fourteenth Amendment and that Plaintiffs are still being harmed by the lines drawn as the direct product of these violations demonstrates that many of Plaintiffs' claims against the 2011 plans are not moot. Specifically, Plaintiffs contend that they continue to be harmed by violations of the VRA and Fourteenth Amendment in CD23, CD27, and CD35. The configurations of CD35 and CD27 remain unchanged in Plan C235, and whether the harms found regarding CD23 continue in Plan C235 remains to be decided.

While Defendants undoubtedly would prefer that we address those infirmities only in the context of the 2013 legislative session and the plans adopted therein, doing so would potentially deprive Plaintiffs of a remedy tied to that 2011 injury—the § 3(c) remedy. Confining the analysis to the 2013 plan claims would significantly impact the intent analysis for Plaintiffs' intentional vote dilution claims given the involvement of a different Legislature and Defendants' assertion that they could have no such discriminatory intent by simply adopting the Court's interim plans. Plaintiffs should not have to jump through additional hoops to prove that the 2011 mapdrawers' intent carried forward to the 2013 Legislature when Plaintiffs' fundamental claims are that the 2011 mapdrawers acted with discriminatory intent, Plaintiffs

are still being harmed by the districts drawn with that intent, and Plaintiffs have potential relief available under § 3(c) for that harm. Nothing in *Davis v. Abbott* requires a contrary conclusion.

While it is possible that *Davis* implies "at the very least," that the remedied claims are moot, the Court still finds *Davis* distinguishable based on the possibility of § 3(c) relief for certain claims.[5] Because Plaintiffs are still seeking relief under § 3(c) for certain claims, the Court holds they are not moot even where the districts were altered. As discussed below, however, the Court does agree that the remedied § 2 *results* claims are moot.

I. South/West Texas claims

Plaintiffs contend that § 2 requires that there be seven (and some Plaintiffs argue eight) Latino opportunity districts in the combined areas referred to as South/West Texas. Plaintiffs also contend that Nueces County Hispanics have a § 2 right and should be included in one of those minority opportunity districts, and most Plaintiffs contend that Travis County should not be included. Plaintiffs (other than the Task Force Plaintiffs) contend that CD35, the new HCVAP-majority district that connects portions of Austin and San Antonio, is not a valid § 2 district because it is not compact and because it includes Austin/Travis County, where the *Gingles* preconditions are not satisfied because there is no racially

---

[5] The Court does not imply that such relief is or is not available or will be granted; those issues remain to be determined. However, Plaintiffs are seeking such relief and, as this Court previously concluded, "Plaintiffs' claim for § 3(c) relief is certainly not so implausible that it is insufficient to preserve jurisdiction." Docket no. 886 at 15.

polarized voting. And Plaintiffs contend that CD23 is no longer a Latino opportunity district despite its HCVAP-majority status.

Defendants contend that Plan C185 has the number of HCVAP-majority districts in South/West Texas that could be required by § 2 (seven districts), and that the State has discretion in deciding their location based on political and other factors, and thus there is no § 2 violation. Although Plaintiffs acknowledge that Plan C185 contains seven HCVAP-majority districts in South/West Texas, they assert that it does not contain seven Latino opportunity districts, and they assert that Plan C185 does not sufficiently remedy the § 2 violation.

A. Whether there should be eight Latino opportunity districts in South/West Texas?

Some Plaintiffs offered demonstration maps with eight HCVAP-majority districts in South/West Texas. The Supreme Court has recognized that a redistricting scheme may violate § 2 by impermissibly diluting the minority's potential to elect, and has established three threshold requirements for such a vote dilution claim (in the absence of intentional discrimination). The first factor requires that the relevant minority is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

As this Court noted in its March 2012 order, Plans C188 and C211 include a proposed district that stretches from south Hidalgo County all the way to north Travis County, and the Supreme Court ruled that a nearly identical district in the same location was "noncompact for § 2 purposes." *LULAC v. Perry*, 548 U.S. 399, 435 (2006).

In *LULAC*, the Supreme Court emphasized that it was the combination of the "enormous geographical distance" between the Austin/Travis County and Mexican-border communities in McAllen/Hidalgo County, coupled with "the disparate needs and interests of these populations," that rendered the district non-compact for § 2 purposes. *Id.* The Court noted that 77% of the population of the district resided in Hidalgo and Travis Counties, on either end of the district. *Id.* at 424. Although this number is reduced to 69% in CD10 in Plan C188 and to 73% in CD33 in Plan C211, the basic problem with the proposed districts remains the same. Thus, these plans are foreclosed by *LULAC v. Perry* and fail to demonstrate that an additional compact opportunity district could be drawn in South/West Texas.

LULAC demonstration plan C262 proposes a district (CD28) that connects rural southwest Texas counties (Webb, Dimmit, and Maverick Counties) with parts of Bexar County and northeastern Travis County. Plan C261 includes a similar district (also CD28) that extends farther south and connects parts of Starr County with parts of Bexar and Travis Counties. Although these districts are unlike the district found noncompact in *LULAC v. Perry* insofar as the population is more evenly dispersed among the various counties in the districts[6] the districts still span a very large distance and connect

---

[6] In Plan C261, approximately 2% of the CD28 population is in Starr County on one end, 17% is in Travis County on the other end, 36% is in Webb County, and 10% is in Bexar County. In Plan C262, 36% of the CD28 population is in Webb County and 8% in Maverick County at one end, 17% in Travis County on the other end, and 8% in Bexar County.

Hispanic populations in Travis/Hays and Bexar Counties with border communities that seem to have little in common with those populations. Although the Court could perhaps find them to be compact if sufficient evidence were presented, Plaintiffs have not proffered any basis for joining these various populations aside from race to show that this is a compact minority population, taking into account traditional districting principles and communities of interest.[7]

In addition, Plans C261 and C262 create a long, thin district CD27 that spans from Hidalgo County to Wharton County near Houston, and another long district CD15 running alongside CD27 that joins part of Hidalgo County with Jackson County. Although the Court is aware that sparser population in some south and southwest Texas counties results in larger districts spanning longer

---

[7] LULAC also presented partial plans C256 and C259 during the 2014 trial on the congressional plan. These plans include a proposed South Texas Latino opportunity district (CD28) that spans from Hidalgo County to Hays County (there are only slight variations in Hidalgo, Wilson, and Hays Counties in these two maps) and a Travis County-based, Anglo-CVAP-majority CD25 (proposed as a tri-ethnic coalition district), as well as eight HCVAP-majority districts. LULAC's counsel referred to Plans C256 and C259 in his closing argument, TrA1970, but he proffered no evidence concerning these plans at trial other than the plan maps and data. LULAC's expert George Korbel (who drew these plans) testified that they "fixed" CD23 and created an additional district out of Corpus Christi that would be very similar to the Corpus Christi district (CD27) under the benchmark plan, but he otherwise did not testify about these plans or discuss the proposed district. TrA1211. *See Rodriguez v. Harris Cty.*, Tex., 964 F. Supp. 2d 686, 738 (S.D. Tex. 2013) (noting that it is plaintiffs' burden to put on some evidence of geographical compactness for § 2 purposes).

distances, Plaintiffs have offered no justification for the creation of such long and narrow districts joining these various populations, other than race. Further, Plan C262 (Korbel's preferred map) creates a CD16 joining El Paso with ten other West Texas counties in a significant deviation from its prior compact configuration in El Paso County, and again there is no evidence in the record demonstrating that joinder of these communities has any basis besides achieving a 50% HCVAP population.[8] Without any additional information, the Court is unable to determine whether the minority populations contained in such districts are compact for § 2 purposes: The fact that the Legislature's enacted map contains three such "fajita strip" districts does not relieve Plaintiffs of their obligation to produce evidence showing that *their* proposed *Gingles* demonstration districts are compact for § 2 purposes.[9] Thus, these plans fail to demonstrate that

---

[8] The Rodriguez Plaintiffs objected to a similar El Paso district proposed by MALC in Plan C211. Docket no. 465 at 17.

[9] In his 2014 closing argument, Mr. Garza stated that plaintiffs "presented testimony both through Dr. Kousser and Mr. Korbel that measured the compactness of [the proposed HCVAP-majority districts in Plan C262] based on the measures contained in the RedAppl utility. Mr. Korbel testified that those districts in 262 were comparable to the compactness of districts – in 185." TrA2129. The Court has not located any testimony from Mr. Korbel about the compactness of the South/West Texas districts in Plan C262. The plan data submitted with Plan C262 includes the compactness analysis using area rubber band and perimeter-to-area measurements from RedAppl, but these measurements were not discussed at trial. Korbel did state that using compactness measurements "is a way to compare the different plans" and "one of the things that I think is important is, are the plaintiffs' plans within – within the rangeof compactness that the State plan is." TrA1215. However, he never actually

an additional compact Latino opportunity district could be drawn in South/West Texas.

B. Plaintiffs' claims and proposed maps with seven HCVAP-majority districts in South/West Texas

Given the Court's conclusion that Plaintiffs have failed to demonstrate that § 2 requires more than seven HCVAP-majority districts in South/West Texas, the Court must initially determine whether Plaintiffs may bring a § 2 claim against a map such as Plan C185 that has seven HCVAPmajority districts in South/West Texas. If so, the Court must relatedly determine whether CD23 and CD35 in Plan C185 are Latino opportunity districts required or permitted by § 2 and whether Nueces County Hispanics have established a § 2 claim.

Defendants contend that Plaintiffs must show that more HCVAP-majority districts could have been drawn than were included in Plan C185, and because they fail to do so, they cannot bring a § 2 claim. Defendants point to *Johnson v. De Grandy*, 512 U.S. 997 (1994), in which the Supreme Court stated that, "[w]hen applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Id.* at 1008. However, the dispute in *De Grandy* centered on "whether Hispanics are

---

compared Plan C262 with Plan C185 interms of compactness scores. In addition, the State's enacted plan contains many non-compact districts due to its highdegree of gerrymandering, and thus the compactness of districts in Plan C185 is not, standing alone, an adequate basis for assessing the compactness of Plaintiffs' proposed districts for § 2 purposes.

sufficiently numerous and geographically compact to be a majority in additional single-member districts" and "whether, even with all three *Gingles* conditions satisfied, the circumstances in totality support a finding of vote dilution when Hispanics can be expected to elect their chosen representatives in substantial proportion to their percentage of the area's population." *Id.* at 1007-08.

This case does involve claims that Plaintiffs are entitled to an additional HCVAP-majority district in South/West Texas, as discussed above in relation to certain Plaintiffs' claim that there should be eight HCVAP-majority districts in South/West Texas. But Plaintiffs *also* claim that § 2 requires seven Latino opportunity districts in South/West Texas, and Plaintiffs challenge whether the HCVAP-majority districts in Plan C185 are appropriate Latino opportunity districts and whether they sufficiently comply with § 2. The Supreme Court has repeatedly emphasized that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Id.* at 1007 (citing *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993)). The Supreme Court has never held that a State's creation of a certain number of HCVAP-majority districts forecloses all relief, and nothing in the Supreme Court's precedents indicates that Plaintiffs may not still challenge whether the enacted districts comply with § 2 and are Latino opportunity districts, whether they appropriately and adequately address Plaintiffs' § 2 rights, and/or whether they comply with the Equal Protection Clause. In fact, *Shaw v. Hunt*, 517 U.S. 899, 916 n.8 (1996), indicates that Plaintiffs may challenge whether the minority districts drawn in the State's plan were lawfully drawn, and that the rule of *Johnson v. De Grandy* applies only when the

State's districts are lawfully drawn (or presumed to be).[10] Thus, while Plaintiffs may not have submitted sufficient proof that they are entitled to eight HCVAP-majority districts in South/West Texas, they have shown that they are entitled to seven such districts, and they may assert claims under *Shaw* and § 2 against the districts in Plan C185. The Court thus turns to those claims.

1. CD23 § 2 claims

Plaintiffs claim that CD23 in Plan C185 is not a Latino opportunity district. Defendants assert that it is, noting that both Spanish Surname Voter Registration ("SSVR") and HCVAP increased from the benchmark and both are over 50% (54.1%/54.8% and 58.5% respectively). Thus, Defendants argue, the district provides an opportunity for a politically cohesive Hispanic voting population to overcome any equally cohesive Anglo voting bloc. Docket no. 1250-1 at 14. Defendants also take the position that a 50.1% majority-HCVAP district is by definition an

---

[10] The Court wrote, "Justice STEVENS in dissent argues that it does not matter that District 12 could not possibly remedy a § 2 violation because he believes the State's plan would avoid § 2 liability. As support, Justice STEVENS relies on our decision in *Johnson v. De Grandy*, 512 U.S. 997, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994),which he reads to say that 'a plaintiff cannot make out a prima facie case of vote dilution under § 2 unless he can demonstrate that his proposed plan contains *more* majority-minority districts than the State's.' The dissent's reading is flawed by its omission. In *De Grandy*, we presumed that the minority districts drawn in the State's plan were lawfully drawn and, indeed, we expressly stated that a vote dilution claim under § 2 'requires the possibility of creating more *than the existing number of reasonably compact districts* with a sufficiently large minority population to elect candidates of its choice.'" (emphasis in original) (some citations omitted).

opportunity district regardless of its projected election performance or other factors because, if minority voters will "pull, haul, and trade," they can control the district. Therefore, Defendants reason, because CD23 is majority HCVAP, it is an opportunity district.

Plaintiffs and their experts contend that election performance and other factors (as opposed to mere population statistics) determine whether a district is an opportunity district, and most of the experts contend that a district is not a Latino opportunity district unless Latinos can win 50% of the time or more on an exogenous statewide election index. As discussed below, the Court does not agree with either side's position, but finds that proposed CD23 in Plan C185 was not intended to be and is in fact not a Latino opportunity district despite its majority-HCVAP status.

First, the Court rejects Defendants' bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district. Although some courts have applied such a rule and held that § 2 challenges may not be raised to a majority-minority district,[11] that appears to be a minority view. In fact, Justice Kennedy recognized that a majority-HCVAP district may still lack "real electoral opportunity." *LULAC*, 548 U.S. at 428 (Kennedy, J.); *see also Bartlett v. Strickland*, 556 U.S. 1, 39-40 (2009) (Souter, J., dissenting) ("[E]ven when the

---

[11] For example, in *Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012), the court relied upon the bright-line 50% threshold for plaintiffs to prove the first *Gingles* condition and Supreme Court cases stating that § 2 does not require maximization or electoral advantage to hold that a plaintiff may not establish a claim for § 2 vote dilution when the challenged district is already majority-minority under *Bartlett*'s definition.

50% threshold is satisfied, a court will still have to engage in factually messy enquiries about the 'potential' such a district may afford, the degree of minority cohesion and majority-bloc voting, and the existence of vote-dilution under a totality of the circumstances.").

Although no Supreme Court decision explains when a majority-HCVAP district lacks "real electoral opportunity," some lower courts have considered this issue and, consistent with Justice Kennedy's observation, have recognized that the majority-minority status of a district does not preclude a § 2 claim. For example, in considering a plan in which all five districts were majority-African American (though in terms of registered voters "blacks would have exceedingly slim majorities in some of these districts and minorities in others"), the Fifth Circuit noted that "[t]he mere existence of a black population majority does not preclude a finding of dilution." *Moore v. Leflore Cty. Bd. of Election Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974) (citing *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc) (rejecting claim that "an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a minority of registered voters, comprise a majority of the total population of the parish" because although population is the proper measure of equality in apportionment, access to the political process and not population is the barometer of dilution of minority voting strength)). The Court recognized that the history of fear and civil rights repression resulted in minimal political activity for African Americans such that drawing a district that retained "the barest of black population majorities . . . enhanced the possibility of continued black political impotence." *Id.* The Fifth Circuit therefore

affirmed the district court's rejection of such a plan in favor of a plan with four districts with greater black majorities such that "[b]lack voters [were] therefore far more likely to be able to exercise their franchise in a full and meaningful way." *Id.* at 625.

Later, in *Salas v. Southwest Texas Junior College District*, 964 F.2d 1542, 1547 (5th Cir. 1992), the Fifth Circuit held that even when a protected group is the registered voter majority, it may seek relief in a vote dilution case; the question would be one of proof. The Court recognized that "access to the political process, aside from population statistics, is the criteria by which a court determines illegal or unconstitutional vote dilution." *Id.* at 1549. Thus, whether dilution exists is determined as part of the totality of circumstances, peculiarly dependent on the facts of each case. *Id.* at 1551.

As Dr. Lichtman noted, demographics alone do not demonstrate opportunity; the degree of racially polarized voting and turnout will affect whether an HCVAP-majority district provides opportunity, such that a searching, practical inquiry is required. Tr1226-27, Tr1258. *Gingles* established that the majority-HCVAP requirement is the minimum threshold a § 2 plaintiff must demonstrate because otherwise that plaintiff cannot show potential to elect as a matter of law,[12] but the existence of

---

[12] The Supreme Court has held in the context of claims involving the failure to create opportunity districts that if minority voters cannot demonstrate at least a potential to elect, then voters challenging a structure as diluting their ability to elect cannot claim that the challenged structure or practice is responsible for their inability to elect. *Gingles*, 478 U.S. at 50. For § 2 results claims, *Gingles* and *Bartlett* define potential to elect as having majority-minority CVAP population in a district.

a majority HCVAP in a district does not, standing alone, establish that the district provides Latinos an opportunity to elect, nor does it prove non-dilution. In other words, it is a necessary but not always sufficient requirement for opportunity under *Gingles*.

As part of the "totality of circumstances" analysis, courts consider two factors that focus on the effect of past discrimination on minority groups' ability to participate in the political process: (1) the history of voting-related discrimination in the State or political subdivision; and (2) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1399 (5th Cir. 1996) (citing *Gingles*, 478 U.S. at 44-45). In *Salas*, the Fifth Circuit also directed courts to consider whether voting is polarized along racial lines and whether the inability of the protected class to elect was caused primarily by racial bloc voting or instead by other circumstances that the VRA does not redress. *Salas*, 964 F.2d at 1554-55. Looking to the totality of circumstances, it held that a protected group may attempt to prove that its registered voter majority is "illusory" because of errors or shortcomings with the registered voter data, because of practical impediments to voting, or because low turnout at elections was the result of prior official discrimination. Id. at 1555. However, a protected class is not entitled to § 2 relief merely because it turns out to vote in a lower percentage than non-protected voters. *Id.* at 1556.

The Second Circuit considered this issue in *Pope v. Albany County*, 687 F.3d 565 (2d Cir. 2012). The court recognized that a majority-minority CVAP population

means that, by definition, if the majority voters are cohesive, they have the opportunity to control the outcomes of elections. *Id.* at 575-76. However, low voter registration and turnout rates may mean that this opportunity cannot be realized, and "low voter registration and turnout rates raise questions that go beyond the merely statistical because, as the Supreme Court has recognized, such circumstances may sometimes be 'traceable, at least in part, to [a] historical pattern of . . . official discrimination.'" *Id.* at 575 n.8. As a result, "the law allows plaintiffs to challenge legislatively created bare majority-minority districts on the ground that they do not present the 'real electoral opportunity' protected by Section 2." *Id.*[13]

The Seventh Circuit embraced this same principle in *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984), a case that predates *Gingles*. In *Ketchum*, the district court had determined that in fashioning a remedial district, a bare majority constituted an effective majority for minority groups because "there is no statistical or objective evidence in the record that a minority is entitled

---

[13] The Second Circuit held that a plaintiff may satisfy the first *Gingles* factor simply by meeting the 50.1% CVAP requirement, and that the size of the minority population in the district "may well be among the totality of circumstances that can inform the ultimate determination of vote dilution and the appropriate remedy." *Pope*, 687 F.3d at 574. Thus, the majority-CVAP requirement still serves a useful gate-keeping role by identifying, in broad terms, when a minority group has at least "the potential to elect representatives in the absence of the challenged structure or practice" and "serves at the outset to screen out cases in which there is no point in undertaking a full Section 2 analysis." *Id.* at 575 & n.10. "Toward that end, it asks a preliminary question; it does not attempt to answer the ultimate one." *Id.*

to or should have more than a majority of the voting age population in order to have a reasonably fair opportunity to vote for candidates of their choice or even to elect candidates of their choice." *Id.* at 1411 (citing the trial record of the lower court). But the court of appeals disagreed, explaining that the district court failed to consider "voter registration and turn-out patterns in the Hispanic and black communities" in determining whether there was a reasonable opportunity to elect. *Id.* at 1413.

Thus, while an HCVAP-majority always provides a *theoretical* opportunity, courts and experts in the field have phrased the § 2 requirement (for both liability and remedy in many instances) as providing "realistic opportunity," "reasonable opportunity," "practical opportunity," "effective opportunity," and like terms. *E.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006) ("[A]ll that is required is that the remedy afford Native-Americans a realistic opportunity to elect representatives of their choice."); *Kirksey v. Bd. of Supervisors of Hinds Cty., Miss.*, 554 F.2d 139, 150 (5th Cir. 1977) ("These figures, adjusted upward to a skin-of-the-teeth 'maybe so' 50% of voting age population, were coupled with inconsistencies in predicting bloc voting patterns to support the inference of 'realistic opportunity.'"); *see also Bartlett*, 556 U.S. at 29 n.2 (Souter, J., dissenting) ("§ 2 simply provides that, subject to qualifications based on a totality of circumstances, minority voters are entitled to *a practical chance* to compete in a roughly proportionate number of districts.") (emphasis added).[14]

---

[14] Although in past practice some courts have imposed a 60 or 65% minority population rule to ensure an effective opportunity, this

A "real opportunity" is not a guarantee of success, as the Court is mindful that § 2 does no guarantee electoral success for minority-preferred candidates. *LULAC*, 548 U.S. at 428 ("We have said that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.") (citation omitted).[15] Along those lines, the Court rejects Plaintiffs' position that a district provides opportunity only if the district would allow minority voters to elect their candidate of choice more than 50% of the time in an exogenous election index. Section 2 does not require that minority-preferred candidates would win some number of exogenous statewide elections in a proposed district. Such a requirement is not compatible with the Supreme Court's directives that § 2 requires a

---

Court does not adopt such a rule and instead supports a particularized inquiry into the facts of each case to determine whether a particular district provides a reasonable opportunity. *See, e.g., Cottier v. City of Martin*, 604 F.3d 553, 571 (8th Cir. 2010) (Smith, J., dissenting).

[15] *Uno v. City of Holyoke*, 72 F.3d 973, 979 (1st Cir. 1995) ("the statutory scheme does not provide an assurance of success at the polls for minority candidates"); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 449 (S.D.N.Y. 2010) ("This does not mean that Port Chester is obligated to guarantee electoral success for Hispanics, but rather the plan must provide a genuine opportunity 'to exercise an electoral power that is commensurate with its population.'") (citing *LULAC*, 548 U.S. at 428); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 763 (N.D. Ohio 2009) ("[T]here is no right under the Voting Rights Act to win; there is, rather, a right to meaningfully compete.").

searching, practical inquiry specific to the facts of each case.[16]

Performance of 50% or lower on a statewide exogenous election index does not automatically rule out minority opportunity. Based on the evidence, we know that CD23 may still perform relatively well for minority-preferred candidates even when its performance on statewide indices is equal to or less than 50%.[17] The OAG 10 indicated that benchmark CD23 performed for minority candidates in only 3 of 10 statewide elections, and Dr. Handley's 2011 and 2014 analyses indicated a 40% and 50% minority success rate. TrA617 (Handley). The Task Force indices revealed a 7/14 (50%) and a 3/7 (43%) success rate.[18] Nevertheless, despite the 50% or less success rate in those exogenous election indices, preferred-minority candidate success in the actual endogenous elections of the district demonstrates that benchmark CD23 did in fact provide "real electoral opportunity." *See* TrA592-93, TrA617-18 (Handley) (the endogenous election is most important to consider because it shows whether a district is actually performing for minorities, and she would not rely on the exogenous

---

[16] *Gingles*, 478 U.S. at 79 (explaining that the proper assessment of vote dilution claims is "peculiarly dependent upon the facts of each case").

[17] In fact, this knowledge forms part of the basis for Dr. Alford's opinion that proposed CD23 would still perform in endogenous elections despite its poor performance on the exogenous election indices. Dr. Alford's opinion is discussed below.

[18] As these numbers demonstrate, a standard that relies on a certain percentage of wins in an exogenous election index is further undesirable because different indices reflect different success rates depending on the set of elections selected.

election index in an existing district); *see also* Engstrom Corr. Rebuttal Report (docket no. 307-1) at 26-27; Tr512-15 (Engstrom) (to determine whether a district is an opportunity district, he would look to endogenous elections if there were any, and benchmark CD23's endogenous performance demonstrates that it was a Latino opportunity district despite its lack of performance in 2010). Of course a proposed district such as CD23 in Plan C185 will not have endogenous election indices to guide the determination, and performance on an exogenous election index (or various indices, preferably) will be important evidence in determining whether a district provides real opportunity to elect. The Court simply declines to adopt any bright-line rule that sets a specific success percentage on such indices for defining opportunity.

With these principles in mind, the Court turns to an examination of whether proposed CD23 provides "real electoral opportunity." The Court begins with the Supreme Court's decision in *LULAC v. Perry*, 548 U.S. 399 (2006), which concerned CD23 after the 2003 redistricting. In 2003, the Legislature, trying to protect Republican incumbent Henry Bonilla, reduced the HCVAP of CD23 from 57.5% to 46% and "the projected results in new District 23 show[ed] that the Anglo citizen voting-age majority [would] often, if not always, prevent Latinos from electing the candidate of their choice in the district." *Id.* at 427. Although the benchmark district "had not been an effective opportunity district," the district court found it was "moving in that direction," and the Latino candidate of choice won 13 of 15 statewide elections in the district in 2002. *Id.* at 428. The fact that Latinos had not yet won elections in CD23 itself did not

resolve the issue of vote dilution, because the Latino majority was becoming more active and was increasingly voting against Bonilla, such that CD23's "Latino voters were poised to elect their candidate of choice." *Id.* at 438. Thus, the Court found that Latino voters had a real opportunity to elect that was taken from them by the redistricting. *Id.* at 428-29.

On remand, the U.S. District Court for the Eastern District of Texas redrew CD23 to be an "effective Latino opportunity district" based on its HCVAP numbers (57.4%) and its election performance. *LULAC v. Perry*, 457 F. Supp. 2d 716, 721 (E.D. Tex. 2006) ("In addition to the HCVAP numbers, the underlying data from the statewide elections supports the conclusion that new District 23 will perform as an effective Latino opportunity district."). Even when drawn to be "effective" and with a 57.4% HCVAP, however, CD23 did not consistently perform for minority candidates of choice, and the elections were close. CD23 elected the minority-preferred candidate in the first two of three endogenous elections, with the loss in which Canseco was elected occurring during the Republican/Tea Party sweep in 2010. According to Dr. Engstrom, the 2010 election was highly racially polarized, and Latino turnout was low. Engstrom Corr. Rebuttal Report (docket no. 307-1) at 25-26; Tr509 (Latino support for Rodriguez was 84.7% while non-Latino support was only 18.1%) (Latinos were 40.77% of actual voters turning out); Tr514 (turnout was low compared to registration percentages); *see also* Tr1865 (Alford) (agreeing with Engstrom's turnout data).

In 2011, Republican leaders in the House and Senate were concerned that Canseco would lose the 2012 election unless the district was changed to protect him. TrA224-25

(Seliger) (agreeing that he thought it was possible that Canseco would lose in 2012 if the district were not reconfigured). Mapdrawer Ryan Downton knew that Canseco was not the Latino candidate of choice. Tr966 (Downton) ("I was told that he was not."); Downton 8-12-11 depo. (Joint Ex. J-62) at 90 ("I don't believe he was."). As it did in 2003, the Legislature therefore reconfigured the district to protect a Republican candidate who was not the Latino candidate of choice from the Latino voting majority in the district. And as it did in 2003, the Legislature intentionally split a largely Hispanic county (Maverick County, which is 95.7% Hispanic) and city (Eagle Pass) to exclude from CD23 politically active Hispanics who would not support Canseco, while adding in all or parts of more Anglo counties. TrA1666 (Downton) (admitting that some Maverick County Hispanics were excluded from CD23 because they would not support Canseco); Downton 8-12-11 depo. (Joint Ex. J-62) at 87 (portions of Maverick County were excluded because "Maverick County does not have a particularly good record of voting in high numbers for Republicans"). However, this time Downton and the Republican leadership took care to maintain SSVR and HCVAP levels above 50% (and in fact above benchmark), thus maintaining theoretical opportunity, while simultaneously manipulating the population of the district to decrease its potential effectiveness for Latinos. This was not an easy task, given that the Senate-side mapdrawers had been unable to maintain CD23 as an opportunity district and still protect Canseco, TrA222-24 (Seliger), and it did not happen by accident. TrA524 (Flores) (the changes are systematic and precise, not accidental).

In addition to the Maverick County split to exclude politically active Hispanics who would not support Canseco, mapdrawers (specifically Downton) took steps to increase the turnout gap between Latinos and Anglos and to decrease Latino cohesion in the district. Although Downton did not propose the "nudge factor" idea, Downton understood that manipulating Latino cohesion and turnout would affect a district's performance for minority voters. Downton 8-31-11 depo. (Joint Ex. J-62) at 26-27. Downton admitted to increasing the district's SSVR while simultaneously intentionally manipulating (decreasing) Hispanic voter cohesion in the district by including Republican Hispanics and excluding non-Republican (Democrat) Hispanics. He stated that he did this by looking for precincts with high SSVR and including those with high voting percentages for Republicans and excluding those with lower voting percentages for Republicans.[19] The intentional use of race to maintain or increase the HCVAP and SSVR levels was not done to provide or protect Latino voter opportunity

---

[19] Of course, as Downton acknowledged, precincts with both high SSVR and high voting percentages for Republicans would not necessarily include only precincts with higher numbers of Hispanic Republican voters. They could also reflect precincts with low Hispanic turnout and high Anglo Republican turnout or higher Anglo bloc voting levels. Further, although Downton claimed this manipulation to allegedly include Hispanic Republicans was to help Republican Hispanic incumbent Canseco, he did not consult with Canseco about whether the changes would benefit him in the Republican primary, and Downton made changes that did not favor Canseco in this regard. The Court finds that Downton's changes were not made to aid Canseco as a Hispanic Republican, but to make the district less effective for Hispanics, whom Downton viewed as synonymous with Democrats.

but rather "to create the facade of a Latino district." *See LULAC*, 548 U.S. at 441 (noting that the use of race to create the facade of a Latino district weighed in favor of a § 2 claim); TrA525 (Flores).

Although Downton denied intentionally manipulating turnout, the Court does not find this denial to be credible. More than 600,000 individuals were moved around to achieve the final configuration of CD23, and 39 voter tabulation districts ("VTDs") were split. PL-1633. Downton split two precincts in Maverick County, nineteen precincts in Bexar County, nine precincts in El Paso County, one precinct in La Salle County, and eight precincts in Atascosa County, and he did not provide any convincing explanations for the splits, indicating that race was being used as the basis for allocating population into and out of CD23.[20] He moved in lower-turnout Hispanics and moved out higher-turnout Hispanics in some areas. In other areas, he moved in Hispanics but simultaneously moved in Anglos with comparatively higher turnout rates. The net effect across the district was to widen the participation gap by 4.1% (decreasing SSVR turnout and increasing non-SSVR turnout). TrA519-20, TrA523-24 (Flores) (noting that non-Latinos in the district turn out at almost a two-to-one rate compared to Latinos).[21]

---

[20] *See Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (given that RedAppl provides only racial data at the block level, the fact that a district splits VTDs and individual streets in many places suggests that racial criteria predominated over other criteria in determining the district boundaries).

[21] Defendants argue that changes in Bexar County were made to create new CD35 and maintain HCVAP levels in CD20, but Downton's explanations of why certain areas in Bexar County were included and excluded were not credible and were not supported by

Plaintiffs established by a preponderance of the evidence that turnout was manipulated in addition to cohesion, and the increases in SSVR and HCVAP were not intended to and did not maintain or improve Latino voting strength. TrA518-19 (Flores).[22] Instead, Downton used race to increase the SSVR and HCVAP of CD23 to

---

the evidence. Further, Dr. Alford's conclusions regarding Bexar County are consistent with Plaintiffs' experts and do not undermine Dr. Flores's conclusions that the *overall* effect of areas moved in and out of CD23 was to decrease SSVR turnout, increase non-SSVR turnout, and widen the turnout gap. In addition, the fact that the turnout analysis was based on 2010 turnout (a non-presidential year) and there may be lower minority turnout in such years than in presidential years (such as 2008) does not undermine the conclusion that the turnout gap was intentionally widened. Flores compared turnout rates in the benchmark district and the proposed district *in the same election year* (2010), and found the turnout gap was significantly increased between the benchmark and the enacted plan. We can only speculate about what the turnout results may have shown in a different year; such speculation does not undermine Dr. Flores's results.

[22] The fact that the specific datasets originally requested by Opiela were not available in RedAppl does not undermine the conclusion that turnout was manipulated. The evidence, including the testimony of Clare Dyer and the expert testimony, establishes that turnout could be manipulated based on data available in RedAppl. In addition, the evidence indicates that the OAG produced reports showing estimated turnout by race for VTDs in the various districts, including CD23 (*see* US-600, Quesada-271); TrA1740 (Downton) (discussing the fact that US-601, a racially polarized voting analysis produced by the OAG, included estimated turnout percentage for Hispanic voters in CD23 in various elections). Further, as Downton made changes to the district he could and did evaluate their impact on the district's performance for Latino candidates of choice. Thus, any argument that Defendants lacked the necessary data to manipulate turnout is refuted by the evidence.

create the facade of a Latino opportunity district, while he intentionally manipulated Hispanic voter cohesion and turnout to reduce the performance of the district for Hispanic candidates of choice. Downton knew and intended that the changes would decrease performance for Latino-preferred candidates in the district, and he knew from the OAG 10 that he had achieved this intended goal.

Further, Solomons' statements on the House floor (which were likely prepared by Downton) actively misled other legislators about why changes were made and about the district's performance. He stated that mapdrawers maintained the performing nature of all the Hispanic-majority districts and that increases to SSVR in CD23 were necessary to "maintain the performing nature" of CD23 in particular. D-603.2 at S367. The evidence indicates that mapdrawers did not maintain the performing nature of the district, that it in fact performed worse, and that mapdrawers were not only aware of this fact but intended it. Yet they claimed their use of race was to help Latino performance in order to maintain the facade of a Latino opportunity district.

Thus, to protect an incumbent who was not the choice of the Latino majority in the district and who they knew would likely be ousted in the next election by those Latino voters, mapdrawers intended to decrease and successfully decreased the performance of CD23 for minority-preferred candidates. There was both discriminatory motive and improper use of race to achieve the desired goal.[23] While § 2 does not require relief merely due to

---

[23] While incumbency protection may be a legitimate goal standing alone in certain circumstances, "winning an election does not

lower Latino voter turnout, intentionally targeting Hispanic voter turnout and cohesion while advantaging Anglo cohesion and turnout is qualitatively different.[24] And when done to minimize Hispanic electoral opportunity, it bears the mark of intentional discrimination.

The Court also finds that the reconfiguration of CD23 had the intended effect insofar as it decreased minority performance. This decrease in performance is undisputed, but the parties do dispute whether CD23 still provided an opportunity for minority voters to elect. As noted above, although a district may provide theoretical opportunity given its majority-HCVAP status, whether a proposed district provides "real electoral opportunity" must be determined through an examination of the

---

empower anyone in any party to engage in purposeful racial discrimination." *N. Ca. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 226 (4th Cir. 2016). As Judge Costa recently noted, discriminatory purpose can be the product of "elected officials engag[ing] in the single-minded pursuit of incumbency." *Veasey v. Abbott*, 830 F.3d 216, 335-36 (5th Cir. 2016) (Costa, J., dissenting in part) (citing *Garza v. Cty. of L.A.*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) ("[M]any devices employed to preserve incumbencies are necessarily racially discriminatory."); *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 313 (D. Mass. 2004) (noting that incumbency protection in its traditional form is often thought to be a legitimate consideration in redistricting; "[t]he issue becomes more complex, however, when race is used as a tool to achieve incumbency protection").

[24] This is even more true given the well-documented history of discrimination against Hispanics in Texas and its lingering effects on their electoral participation, which is discussed later.

totality of the circumstances, including its performance on exogenous election indices.

All of the Plaintiffs' experts opined that CD23 in Plan C185 does not provide electoral opportunity. Dr. Flores concluded that proposed CD23 was not an opportunity district and that a Hispanic candidate would find it very difficult to get elected. Tr454-55. Dr. Arrington also testified that the exogenous election index indicates that CD23 offers no opportunity for Hispanics to elect a candidate of their choice. TrA405. Dr. Engstrom concluded that CD23 was not a Latino opportunity district. Tr515-16. Dr. Lichtman stated that CD23 does not provide a reasonable opportunity to elect minority candidates of choice. Tr1235-36 (also noting that the candidate of choice of Latino voters lost five general elections in 2008 and 2010, and in some cases by wide margins); Joint Expert Ex. E-3 at 15-17, Table 8. Dr. Handley performed a functional election-based analysis of CD23, using its demographics as a starting point, and then considering election performance, racial bloc voting analyses, crossover, cohesion, and participation rates, and concluded that CD23 in Plan C185 would not have given minority voters an opportunity to elect candidates of choice. TrA590-92 (Handley). Her 2014 exogenous election index using six statewide, top-of-the-ticket elections from 2002 to 2012 that included a minority-preferred minority candidate showed 0/6 wins for the minority-preferred candidates. TrA596 (Handley).

Even Dr. Alford stated that he would not count CD23 as "effective" or "performing" for Latinos (though of course that is not the measure of opportunity). Tr1839, Tr1878; Alford depo. (Joint Ex. J-43) at 139; D-430 (also finding 0/6 wins for Democrats in his reconstituted

exogenous election analysis). In his 2014 testimony, however, Dr. Alford opined that CD23 is capable of electing a Democrat (which he equates with Latino candidate of choice) even though it "tilts Republican" in the exogenous election index, and he performed a "reconstituted mosaic" analysis to determine whether this might be true in Plan C185. He concluded that in Plan C100 and Plan C235, there is the potential for the CD23 endogenous election to be more favorable to minority candidates than the exogenous pattern would suggest, and his analysis suggested that it was at least possible that the same would be true for the Plan C185 configuration. TrA1857 (Alford). However, the Court finds that Alford's unique methodology and conclusions are too speculative to be afforded much weight, and his conclusions are outweighed by the numerous expert opinions offered by Plaintiffs that CD23 as configured in Plan C185 does not provide real electoral opportunity.

In addition to the expert analyses and exogenous election indices indicating that CD23 as enacted in Plan C185 does not provide real electoral opportunity, all of the experts agreed that there is racially polarized voting in Texas, and the State conceded this point with regard to all areas included in CD23. As noted, Dr. Engstrom found significant racially polarized voting in the 2010 general election for CD23. Engstrom Corr. Rebuttal Report (docket no. 307-1) at 25; Tr509 (incumbent Rodriguez received an estimated 84.7% of the votes cast by Latinos and just 18.1% of those cast by non-Latinos).

The Court further considers the mapdrawers' fracturing of Maverick County and politically active communities in South San Antonio. Disruption of politically active and cohesive Latino voting areas has the

foreseeable effect of depressing Latino turnout, magnifying the increase in the turnout gap identified by Dr. Flores. *See LULAC*, 548 U.S. at 440 (noting that the State acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo).

Plaintiffs also provided evidence concerning the lingering effects of past discrimination on Latino voter turnout and electoral opportunity. Several courts have recognized the "long history of discrimination against Latinos" in Texas and its role in the electoral process. *LULAC*, 548 U.S. at439-40 (citing cases); *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993) ("Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute among the parties. Nor has anyone questioned plaintiffs' assertion that disparities between white and minority residents in several socioeconomic categories are the tragic legacies of the State's discriminatory practices."). The Supreme Court has further recognized that "the 'political, social, and economic legacy of past discrimination' for Latinos in Texas may well 'hinder their ability to participate effectively in the political process.'" *LULAC*, 548 U.S. at 440 (citations omitted).

Dr. Andres Tijerina's expert report was admitted without objection. Joint Expert Ex. E-10. He opined on the history of the violation of civil rights of Latinos in Texas and the use of devices related to voting to limit the Mexican-American vote. *Id.*; Tr592-96 (discussing use of the white man's primary, the poll tax, the literacy clause, intimidation, corralling, slating). He testified that those devices "left a legacy that hinders and has prevented Mexican-Americans from feeling comfortable and feeling

any trust in the electoral system." Tr595. He states that "[t]he legacy of 150 years of multi-faceted government-condoned discrimination against Mexican Americans in Texas is a state educational system that maintains a high drop out rate and is still characterized by widespread segregation." Joint Expert Ex. E-10 at 30. He further concludes that, "[a]s a result of the historical discrimination against Mexican Americans in Texas, they still bear the effects of this discrimination which hinders their ability to participate effectively in the political process" and "[i]t is clear that the lower rates of voter registration, voting, and running for elective office are directly related to this discrimination." *Id.* at 32; Tr596 (Tijerina) (legacies of past discrimination affect voter registration, voter turnout, campaign organization, running for office, and voting itself).

Dr. Susan Gonzalez-Baker's report was admitted without objection. Joint Expert Ex. E-9. She concluded that it is clear "that Latino educational achievement lags far behind that of Non-Latino Whites in the same age bracket." *Id.* at 7. Further, "absolute median incomes are substantially lower for both [Latino] men and women than they are for Non-Latino Whites." *Id.* At 9. Dr. Baker noted that the ACS data "speak to a continuing pattern of disadvantage with respect to social and economic well-being, one that is likely to persist for some time into the future." *Id.* "[O]n indicators spanning a range of topics from educational attainment to childhood poverty, to female-household-headship poverty, to income, to unemployment, Latinos display a continuing legacy of disadvantage relative to their Non-Latino counterparts." *Id.* at 10.

Dr. Jorge Chapa's report was admitted without objection. Joint Expert Ex. E-1. Dr. Chapa surveyed certain counties with large Hispanic populations and established that Texas Hispanics have lower levels of both education and income and higher poverty rates when compared to non-Hispanics, and these disparities have persisted throughout the 20th Century. *Id.* at 4-5. Dr. Chapa noted that the lingering effects of past discrimination such as lower economic and educational attainment are strongly associated with lower rates of registration, voting, and participation in the political system. *Id.* at 5 ("[D]iscrimination still has a strong present day impact on the education, income and earning of Hispanic Texans."); *id.* at 16 (noting effect on voter registration and turnout); Tr179-80, Tr203 (lower economic and educational attainment are strongly associated with lower rates of registration, voting, and participation in the political system); Tr189 (there are lower levels of income, education, and earnings that continue to the present day and they have the lingering effect of lowering the Latino participation rates in vote and registration and politics in general); Tr200 (there are a plethora of studies that show that people with lower levels of education and lower incomes participate less in our electoral system); Tr201 (there are lower registration rates and lower participation rates among registered voters).

Dr. Lichtman analyzed turnout rates (as a percentage of voting age population) for Hispanics, African-Americans, and Anglos in five elections (2008 President, 2008 US Senate, 2008 Supreme Court Chief Justice, 2010 Governor, and 2010 Lt. Governor) and found a statewide mean turnout rate of 14%, 39%, and 52%, respectively.

Joint Expert Ex. E-3 at 10, Table 3. The Fifth Circuit also recently noted in the voter ID case that "the record contains evidence that minority voters generally turn out in lower numbers than non-minority voters and that State-sponsored discrimination created socioeconomic disparities, which hinder minority voters' general participation in the political process." *Veasey v. Abbott*, 830 F.3d 216, 261 (5th Cir. 2016). It is undisputed that Latino voter turnout in CD23 in 2010 was low. Tr509, Tr514 (Engstrom); Engstrom Corr. Rebuttal Report (docket no. 307-1) at 25-26; Tr1865 (Alford).

Considering all the evidence, including the mapdrawers' intent to protect an incumbent who was not the Latino candidate of choice and to lower the Latino performance of CD23, the expert testimony, the high level of racial polarization, the low Latino voter turnout, the manipulation of voter turnout and cohesion, the increase in the turnout gap, the splitting of cohesive, politically active areas (Maverick County, San Antonio), and the lingering effects of past discrimination on turnout and electoral participation, the Court finds that CD23 does not provide real electoral opportunity.

In sum, the VRA does not require that minority opportunity districts be drawn to give minorities a sure chance or even the best chance at electing their candidates of choice. Minorities are not immune from the obligation to "pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020. Section 2 does not require those who draw election districts to draw majority-minority districts with the most potential or to maximize minority voting strength, nor does it always require mapdrawers to account for low voter turnout. However, it does require equality of opportunity, and that

equality is lacking where the mapdrawers take steps to intentionally disadvantage Hispanic voters in the district, even if done to further political goals. Including lower-turnout Hispanics and excluding higher-turnout Hispanics (and fracturing politically cohesive and active Hispanic communities), while simultaneously including higher-turnout Anglos in the district ensures that Hispanics have less practical opportunity to elect. Although the State contends that it has no obligation to account for low Hispanic voter turnout, it certainly has an obligation to avoid treating Hispanic voters less favorably than Anglo voters in determining the population of the district. Similarly, mapdrawers cannot intentionally target Hispanics by including less cohesive Hispanic precincts and those with higher Anglo cohesion in an attempt to depress Hispanic opportunity to elect. Because mapdrawers had the intent to provide Hispanic voters less opportunity to participate in the political process and elect their candidates of choice, and they effectuated that intent in CD23, CD23 violates § 2 in both intent and in effect.

2. CD23 Shaw*-type racial gerrymandering claims*

The Task Force Plaintiffs also mount a *Shaw*-type racial gerrymandering claim against CD23. *See* docket no. 416 at 36; docket no. 1313; docket no. 1308; Fourth Am. Complaint (docket no. 891) ¶ 56. Defendants do not contest standing on this claim. See docket no. 1310. Plaintiffs Gilberto Torres and Socorro Ramos live and vote in CD23 in Plan C185, and thus they have standing to assert this claim. Docket no. 277 at 17 (stipulated); *Shaw*

v. Hunt, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996).25[25]

The Supreme Court recently reaffirmed that a *Shaw*-type racial gerrymandering claim is "that race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). The plaintiff's evidentiary burden is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 1267. In *Alabama Legislative Black Caucus* ("*Alabama LBC*"), the Court recognized such a claim in plaintiffs' evidence "that the legislature had deliberately moved black voters into [certain] majority-minority districts . . . in order to

---

[25] MALC also asserts that it has mounted *Shaw*-type claims against CD23. *See* docket no. 1309 at 7. MALC member Pete Gallego resides in proposed CD23 in Plan C185, which would provide standing to assert such a claim. Docket no. 258-3. However, Defendants contend that MALC has not in fact raised a *Shaw*-type claim, but instead has raised only an intentional discrimination claim under the Equal Protection Clause. Defendants argue that although MALC uses the term "racial gerrymandering," it has done so only in the context of vote-dilution claims and has not pleaded or pursued an independent claim of racial gerrymandering under *Shaw*. The Quesada Plaintiffs also provided briefing concerning how the evidence establishes a *Shaw* claim in CD23. *See* docket no. 1305. The Court need not decide at this time whether these or other Plaintiffs have asserted such a claim.

prevent the percentage of minority voters in each district from declining." *Id.* at 1266-67.[26]

In this case, there is clear evidence that Downton moved certain populations of Hispanics into CD23 to increase its SSVR and HCVAP numbers. In doing so, traditional redistricting principles such as respecting city and county boundaries were subordinated to this racial goal when Downton placed half of Maverick County into CD23 solely to maintain Hispanic numbers, splitting both Maverick County and the City of Eagle Pass. Downton 8-12-11 depo. (Joint Ex. J-62) at 35 (stating that half of Maverick County was placed into CD23 to make sure they were not reducing Hispanic population percentages); *id.* at 86 ("And so 23 in order to stay at benchmark level needed to be more Hispanic in other areas. I think that's why Maverick County is included."); *id.* at 88 (Maverick County population was included solely to maintain Hispanic numbers "to comply with the Voting Rights Act" and not for political reasons); TrA1642 ("we had to maintain the existing majority Hispanic status" of CD23); TrA1754-56 (Downton) (he was not paying attention to the

---

[26] Even more recently, the Supreme Court reaffirmed the principles it set forth in *Alabama LBC*, the *Shaw* line of cases, and *Miller v. Johnson*. *Bethune-Hill v. Va. State Bd. of Elections*, __ S. Ct. __, __ (2017) ("The Court reaffirms the basic racial predominance analysis explained in *Miller* and *Shaw II*, and the basic narrow tailoring analysis explained in *Alabama*."). *Bethune-Hill* additionally made clear, however, that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering" and that courts should evaluate the predominant motive for the design of the district as a whole. *Bethune-Hill*, __ S. Ct. at __.

City of Eagle Pass boundaries when adding in Hispanic portions of Maverick County even though the City is a community of interest). Downton and Interiano stated that maintaining or increasing Hispanic percentages needed to be done to comply with the VRA. Downton 8-12-11 depo. (Joint Ex. J-62) at 88, 73-74 (stating that they tried to comply with the VRA "to make sure that [CD23] wasn't subject to court challenge" by maintaining or increasing all Hispanic population percentages, including total population, HVAP, SSVR, and HCVAP). Downton also stated that he deliberately looked for and included certain precincts with high SSVR. The Court finds that race was the predominant motive in the decision to include significant numbers of Latino voters into CD23, triggering strict scrutiny.

To survive strict scrutiny, the challenged districting plan must be narrowly tailored to serve a compelling governmental interest. *Bush*, 517 U.S. at 976. Downton indicated that he was trying to increase HCVAP enough to be safe from a VRA challenge even though the district's minority electoral performance remained low.[27] US-630 (May 28 email). Downton testified that he was the one who "made the call" regarding inclusion of part of Maverick County. TrA1668. However, increasing Hispanic numbers

---

[27] Doug Davis, the Director of the Senate Redistricting Committee, also testified that he believed CD23 complied with the VRA because they increased the relevant population metrics (Hispanic population, HVAP, HCVAP, and SSVR), though he did not know whether these changes increased Latino ability to elect. Davis depo. (Joint Ex. J-58) at 52-53. He also indicated that VRA compliance was measured primarily by meeting or exceeding benchmark population numbers, and that election performance in terms of ability of elect was an issue left to counsel. *Id.* at 23-25.

simply to avoid a VRA challenge and without attempting to ensure or maintain opportunity to elect (to comply with § 2) or ability to elect (to comply with § 5) (and in fact working to decrease such opportunity and/or ability) cannot survive strict scrutiny because such use of race was not to comply with the VRA. *See Alabama LBC*, 135 S. Ct. at 1274-75 (use of race to preserve minority percentages without preserving minority ability to elect would not be narrowly tailored to comply with § 5); *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996) (explaining that to survive strict scrutiny, the district must be narrowly tailored to further a compelling governmental interest). The Court thus finds that Plaintiffs have established a *Shaw*-type equal protection violation in the drawing of CD23 because the use of race predominated in the decision to include substantial population within and without the district, subordinating traditional redistricting principles, and the use of race was not narrowly tailored to comply with a compelling state interest.[28]

---

[28] *Alabama LBC* indicates that *Easley v. Cromartie*, 28 532 U.S. 234, 258 (2001) sets forth the plaintiff's burden in cases in which the plaintiff asserts a Shaw-type claim against a majority-minority district where racial identification correlates highly with political affiliation and the State argues that politics, not race, was its predominant motive. *Alabama LBC*, 135 S. Ct. at 1267. In that case, the issue was whether individuals were included in a district because they were African American or because they were Democrats—in other words, "whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior (coupled with traditional, nonracial districting considerations)." *Easley*, 532 U.S. at 257 (emphasis in original). That is not the question presented here with regard to CD23. Rather, Defendants admit (and the evidence demonstrates) that a portion of the population of CD23 (half

3. CD35 Shaw*-type racial gerrymandering claim*

Although Defendants contend that the Rodriguez Plaintiffs have not asserted any *Shaw*-type claims, *see* docket no. 1310 at 4-5, these Plaintiffs have plainly asserted such a claim related to CD35 throughout this litigation as part of their Fourteenth Amendment equal protection claim.[29] The Court recognized this in its March

---

of Maverick County) was included because they were Hispanic and for no other reason. In addition, according to Downton, certain precincts were included because they were Hispanic *and* Republican. The fact that, among those Hispanics being considered for inclusion, Downton purportedly tried to choose more Republicans than Democrats, as Downton stated that he did (or, as the Court has concluded, lower turnout Hispanics) does not negate the fact that individuals were first selected for inclusion because of their race. Race, not politics, was the predominant inclusion criterion. And, as discussed, the use of race was not to comply with the VRA and thus did not further a compelling state interest.

[29] *See, e.g.*, docket no. 229 at 10 ("Plaintiffs prevail if they 'show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."(citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)); docket no. 603 at 7 ("CD 35 is also inconsistent with the equal protection requirements in cases such as *Shaw v. Reno* and, more recently, *Bartlett v. Strickland.*"); docket no. 623 at 68-69 ("For related reasons, C185's CD 35 is constitutionally flawed under the *Shaw v. Reno* line of cases, barring racebased redistricting based on convoluted lines and bizarre shapes. CD 35, in fact, strongly resembles the prototypical North Carolina district, CD 12, that gave birth to the *Shaw v. Reno* doctrine."); docket no. 896 (Second Am. Compl.) at 11 (noting that Plan C185 uses race as a tool to divide Travis County and Austin and "[i]n so carving up the residents of Travis County and Austin, the legislature disregarded traditional and neutral redistricting principles"). Their live Complaint asserts that

19, 2012 order, in which it noted that "[c]ertain Plaintiffs, but primarily the Rodriguez Plaintiffs, contend that CD 35 is an impermissible racial gerrymander." Docket no. 691 at 41-42. The Court concluded that, "[w]hether CD 35 crosses the line from a permissible § 2 district to an impermissible racial gerrymander is a close call" and then analyzed the district under the *Shaw* line of cases. *Id.* at 42-49.

The Rodriguez Plaintiffs contend that the new CD35 was drawn predominantly on the basis of race but is not a reasonably compact district and does not comply with § 2. *See* docket no. 424 at 26; docket no. 1277 at 40-41. In support, they note that Defendants' expert Todd Giberson ranked it as the least compact district in Plan C185 by each of the three technical compactness measures,[30] that Dr. Alford also stated it was not a compact district, and that Downton stated it was "borderline" and that he had his doubts that the district was required by § 2. Docket no. 1277 at 40-41; Joint Expert Ex. E-18 (Giberson

---

Plan C185 violates the Equal Protection Clause by purposefully fragmenting Hispanics and African-Americans in all regions of the state, dispersing them among numerous districts without regard to traditional and neutral redistricting principles; that the Legislature carved up the residents of Travis County and Austin by using race and disregarded traditional and neutral redistricting principles; and that Plan C185 uses race as a tool for no compelling reason to destroy CD25 in Travis County. Docket no. 896 at ¶ 18. The fact that Plaintiffs specify an improper purpose does not mean that they are not asserting a *Shaw*-type claim. While an intentional vote dilution and a *Shaw* claim are analytically distinct, meaning the Court must analyze them under different rubrics, they are not mutually exclusive, and the allegations are sufficient to support both types of claims.

[30] Giberson also found that CD35 was not "compelling from a Section 2 standpoint." Giberson depo. (Joint Ex. J-42) at 100-01.

report); Alford depo (Joint Ex. J-43) at 42-44 (noting that CD35 caught his eye and was "definitely not a compact district"); Tr987-88 (Downton). The Rodriguez Plaintiffs further argue that CD35 is "tenuous . . . in terms of the way it links different communities of interest, as well as the way it disregards traditional districting criteria." Docket no. 424 at 28; docket no. 1277 at 42. They note that in Travis County, mapdrawers "went to extreme lengths to gather in Hispanic population" and that minority communities in San Antonio and Austin were linked in a questionable manner into the non-compact new CD35. Docket no. 424 at 28-29; docket no. 1277 at 43. Their claim therefore addresses the elements of a *Shaw*-type racial gerrymandering claim—that race was improperly used in the drawing of the district boundaries, that race was the predominant factor motivating the decision to place a significant number of voters within the district (such that traditional districting criteria were disregarded or subordinated to racial criteria), and that such use of race was impermissible (would not survive strict scrutiny) because the district is not compelled by or drawn in compliance with the requirements of § 2 of the VRA.

Although the Rodriguez Plaintiffs assert an interrelated claim under *Bartlett v. Strickland* that Defendants intentionally destroyed a viable crossover district in Travis County (benchmark CD25) and an intentional vote dilution claim, that does not mean they are only asserting an intentional discrimination claim. As they noted in their Advisory in response to the Court's request for briefing after the *Alabama LBC* decision, "Crossover CD25's dismantlement contains elements of both intentional minority vote dilution and a racial gerrymander. The intentional vote dilution suffices to

invalidate it, but the predominance of race in the way it was accomplished also would invalidate it, in light of *Alabama LBC*, as a racial gerrymander." Docket no. 1302 at 3 n.1. Thus, the Rodriguez Plaintiffs have stated a *Shaw*-type claim against CD35, and Plaintiffs Eddie Rodriguez and Betty Lopez have standing to assert this claim because they live in CD35 in Plan C185. Docket no. 277 at 17 (stipulated).[31]

In its interim map order concerning the CD35 *Shaw*-type claim, this Court concluded that this was a "mixed motive" case as described by a plurality of the Court in *Bush v. Vera*, 517 U.S. 952, 959 (1996), and noted that in such cases "determining when traditional districting criteria have become subordinated to race is highly fact specific and difficult." Docket no. 691 at 44. The Court did not find Plaintiffs likely to prevail on this claim because Plaintiffs had "not convinced the Court at [that] stage that district lines in CD 35 were manipulated to such an extreme degree" that race predominated. Docket no. 691 at 46. The Court now finds that its preliminary finding—made without the benefit of a full examination of the evidence—was in error. A careful review of the evidence shows that CD35 was drawn in such a manner that race predominated. Further, the Court finds that CD35 does not survive strict scrutiny.

---

[31] Although Defendants have argued 31 that Plaintiff Eddie Rodriguez was not harmed because he remained in a Latino opportunity district, *see, e.g.*, TrA851-52 and docket no. 1272 at 126, that argument misunderstands the harm that confers standing to assert a *Shaw*-type racial gerrymandering claim. The harm flows from being "personally . . . subjected to [a] racial classification," not from vote dilution or intentional discrimination. *Alabama LBC*, 135 S. Ct. at 1265.

The Court's fact findings based on the entire record provide ample support for the conclusion that race was the predominant factor motivating the decision to place a significant number of voters within or without CD35. It is undisputed that the Legislature, and its mapdrawer Ryan Downton, intended to create CD35 as a new Latino opportunity district, meaning it had to have over 50% HCVAP. Tr915-16 (Downton) (stating that he was "directed to" create "a new citizen voting age population majority district for Hispanics in Texas"); Tr918 (Downton) ("When we drew the map originally, we were focused on getting District 35 above 50 percent of HCVAP."); TrA1642 (Downton) ("When we were creating District 35, we were creating a Section 2 majority Hispanic CVAP district, so it had to be over 50 percent."). That criteria (a majority HCVAP) was the number one criteria for drawing the district, and could not be compromised for any other purpose or traditional districting criteria. Downton 8-12-11 depo. (Joint Ex. J-62) at 86 ("We had to keep or we wanted to keep 35 above 50 percent.").

Defendants admit that Downton set out to draw a majority-HCVAP district when he drew CD35 and that he considered racial data to reach the 50% threshold. Docket 1272 at 126. However, Defendants argue that non-racial factors, including placing the district where the population growth occurred and partisan politics (including targeting Congressman Lloyd Doggett), as well as other considerations such as requests from Texas House Representatives to keep Guadalupe County whole or to weight the district more heavily toward Bexar County played a role in shaping the district. The Court finds that while other factors did play some role in shaping

the district, racial criteria had a qualitatively greater influence on the drawing of district lines and selection of district population, such that race predominated over other districting criteria and those other criteria were subordinated to race.[32]

Previously, the Court found significant that although Downton admitted to trying to include Hispanics in the Travis County portion of CD35, Downton had not maximized the Hispanic population in CD35 because some Travis County Hispanics were left outside CD35. *See* docket no. 691 at 46-47. Because of this, the Court noted that "Plaintiffs' assertion that the Legislature 'went to extreme lengths to gather in Hispanic population' [was] not fully supported by the evidence." Docket no. 691 at 47. Upon a full review of the record, the evidence has shown that Downton was trying to weight the district more toward Bexar County at the request of certain Representatives, and thus he did not maximize the number of Hispanics in the Travis County portion of CD35. It is clear, however, that whatever population Downton chose to include in the Travis County portion of CD35, he included because that population was Hispanic and not for other reasons. *See*, e.g., TrA1673-1674 (Downton stating that he included "the Hispanic areas of Travis County" in CD35), Tr989 (with regard to an area

---

[32] The Court notes that the only traditional redistricting principles that Downton could say he complied with in Travis County were "[r]edistricting for partisan purpose[s], protecting incumbents, [and] compliance with the Voting Rights Act with respect to 35." TrA1781 (Downton). The Court further notes that CD35 was not drawn to protect incumbent Lloyd Doggett, whose district CD25 was primarily affected by CD35. TrA1781 (Downton) (stating that he protected Congressmen Flores, McCaul, and Smith).

in north central Austin included in CD35, he said, "If that is a Hispanic area, and I think it is likely that it is, then, yes, it would have been included in District 35 as we were trying to create a Hispanic majority district.").

Downton admitted to drawing the Travis County portion of the district using racial shading in order to find concentrated Hispanic populations to include in CD35. TrA1674-75 ("At some point in trying to get District 35 over the 50 percent threshold, I also turned on racial shading for Travis County to find the concentrated Hispanic populations to draw them in to get over the 50 percent benchmark."). This led to some precinct splits, including the Precinct 433 split to divide St. Edward's University to place the dorms (with large Hispanic student population) into CD35, while placing the administration building in CD21, and the Precinct 440 split to include an arrowhead shape containing the Riverside apartments (a more Hispanic population) within CD35. Tr1198-99 (Butts); TrA1631 (Downton) (stating that sometimes splitting precincts was required by the VRA).[33] Downton admitted that the "squiggle" at the northern part of CD35 was included to increase Hispanic population, and racial shading confirmed that this area was 90-100% Hispanic. Tr989 (Downton). He also noted that he split the African-American community in East Austin because he had to include some of that

---

[33] *See Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 670 (5th Cir. 2009) (noting that "it is obviously questionable whether splitting members of geographically contiguous communities in interest, *i.e.*, the colleges, into separate constituencies would have been legally satisfactory" and "[a]ny plan that split USM into multiple wards, furthermore, would be highly suspect on its face").

population in CD35 "to create a conduit to pick up the rest of the Hispanic population in the northwest part of 35." TrA1779 (Downton).[34] When asked why he wanted "to go up to the northwest part of 35 to join Hispanic population to south San Antonio," he responded, "Because we were trying to create a Hispanic opportunity district that was over 50 percent HCVAP." *Id.* Downton admitted that he paid no attention to the City of Austin boundaries. TrA1782 (stating he did not pay attention to City of Austin boundaries when drawing CD35). The CD35 district lines in Travis County do not match up with any city boundaries, with House districts, or with any recognizable communities of interest other than race. TrA1780-81

---

[34] Although Downton testified that he made efforts in the DFW area to "keep the black population together" in a district, he knowingly split the African-American population in Austin because, as he said, including "that block [an African-American block] was necessary to create a conduit to pick up the rest of the Hispanic population in the northwest part of 35." TrA1779 (Downton). Thus, whereas Downton felt that "keeping the black population together" in DFW was part of the traditional redistricting principle of keeping communities of interest together, he was willing to split up this Austin African-American population to reach an HCVAP-majority in CD35. Further, Downton was aware that African-American voters in Travis County are strongly cohesive Democrats, and if he had simply been including Democrats in CD35, he would not have felt that including this African-American population "was necessary" to achieve his goal of including Hispanics, further evidencing that his goal was simply to include Hispanics. (The Court also notes that Defendants have not seriously contended that certain populations were included in CD35 because they were Democrats (as opposed to Hispanics), but they have instead asserted that creation of CD35 furthered the political goal of attempting to unseat Doggett. As discussed herein, that racial criteria are used to further a political goal does not negate or excuse the use of racial criteria.)

(Downton) (agreeing that the various House districts were divided among several congressional districts); TrA1776 (Downton) ("I think I kept the Hispanic community of interest in east Austin together in District 35.").[35]

In the Bexar County portion of CD35, Downton included areas with high percentages of Hispanic residents and voters and excluded less Hispanic areas. Downton 8-12-11 depo. (Joint Ex. J-62) at 116 (noting that they tried to raise Hispanic percentages in CD35 by including Hispanics from Bexar County); *id.* at 120 (noting that the fact that CD35 is narrow in northern Bexar County is a "Voting Rights Act issue" because "[t]hat northeastern part of Bexar County has a very low concentration of Hispanics, so if we had widened that out up there, it would cause a problem in keeping another majority Hispanic district"); TrA1642-43 ("So in creating District 35, originally, we took a lot of Hispanics out of

---

[35] Defendants also state that CD35 reflects the significant Hispanic growth in this area. However, Travis County was not an area of significant Hispanic growth compared to other areas of the State, and in fact Anglo growth kept pace with Hispanic growth. *See, e.g.*, TrA936 (Ansolabahere) (noting that Travis County was the one area where Anglo growth roughly kept pace with minority growth); D-222 (Gonzalez-Baker Table 2) (showing an increase in HCVAP in Travis County between 2000 and 2010 from 102,342 to 126,810 (approximately 24,000), compared to an increase of almost 50,000 in Dallas County, 42,000 in Tarrant County, and 120,000 in Harris County). In terms of percentage increases, Exhibits D-230 (2000 census) and D-231 (2008-2012 ACS) show that the percentage HCVAP of Travis County increased from 18.86% to 21.05%, while Nueces County increased from 50.97% to 55.87%, Tarrant County from 11.37% to 15.44%, Dallas County from 14.11% to 20.39%, and Harris County from 19.04% to 25.36%.

District 20 to put them into District 35"; and after moving some Hispanic population to increase Hispanic numbers in CD20, "we had to get additional Hispanic population into District 35 to replace what we were giving back to 20, and then we took that from 23"); TrA1752-53 (stating that he did not know about or attempt to consider actual communities of interest in San Antonio, and that he was trying to create districts under the VRA and was "required to consider race to create those"); Davis depo. (Agreed Ex. J-58) at 99-100 (noting that the downtown San Antonio area moved from its historic location in CD20 to the new CD35 was a "Latino community that . . . the policymakers chose to use as a base for the new 35th district"). Further, as discussed more fully in the fact findings, although Rep. Kuempel wanted Guadalupe County kept whole in CD15 and mapdrawers wanted to keep small cities whole, these goals were compromised to keep the HCVAP of CD35 above 50%. TrA1655, TrA1663 (Downton).

The evidence is clear that racial considerations predominated in the determination of what population to include in CD35.[36] That Downton and the Legislature also had the purpose of using CD35 to try to unseat Lloyd Doggett (who lives in Austin/Travis County) does not negate the finding that they used race to do so. *See Shaw*, 517 U.S. at 907 (noting that the fact that the legislature

---

[36] In accordance with the Supreme Court's recent pronouncement in *Bethune-Hill v. Virginia State Board of Elections*, __ U.S. __ (2017), the Court makes clear that although it has analyzed certain portions of CD35 in isolation for evidence that race predominated and that traditional redistricting principles were subordinated to race, its finding that race predominated in the drawing of the district applies to the district as a whole.

addressed other interests, including creating one rural and one urban district and partisan politicking, "does not in any way refute the fact that race was the legislature's predominant consideration"); *Bush*, 517 U.S. at 959, 962 (finding that race was the predominant factor even when the redistricting process was not "purely race-based"); *Clark v. Putnam Cty.*, 293 F.3d 1261, 1270 (11th Cir. 2002) ("[The] fact that other considerations may have played a role in . . . redistricting does not mean that race did not predominate."); *Harris v. McCrory*, 159 F. Supp. 3d 600, 615 (M.D.N.C. 2016) (even in a "mixed-motive suit"—in which a state's conceded goal of "produc[ing] majority-minority districts" is accompanied by "other goals, particularly incumbency protection"—race can be the predominant factor in the drawing of a district without the districting revisions being "purely race-based"), *probable jurisdiction noted*, 136 S. Ct. 2512 (2016) (No. 15-1262).

The Legislature could have simply divided Travis County and Austin Democrats among five Republican districts to unseat Doggett. They did not do so, as the evidence demonstrates (including the supplemental report of Dr. Ansolabahere, showing that the district lines correspond more strongly with race than with party affiliation). Downton chose which population to include in CD35 on the basis of race, not political affiliation.[37] He

---

[37] Again the Court finds this case to be distinguishable from *Easley v. Cromartie*, 532 U.S. 234 (2001). This is not an issue of whether population was included in CD35 because they were Hispanic or because they were Democrat. Rather, mapdrawers relied on race to create a majority-HCVAP district and advanced political motives (dividing Travis County/Austin Democrats among numerous districts, unseating Doggett, limiting the number of Democrat districts) by doing so.

created a Hispanic-majority district so that he could use the creation of exactly such a district (which appeared to be friendly to Hispanic voters and in compliance with the VRA) to fulfill a political motive of unseating Doggett in part by putting Doggett's Hispanic constituents in a Bexar-County weighted district.[38] And placement of a new VRA district in part in Travis County allowed the Republican-dominated Legislature to create a new majority-minority district while simultaneously destroying an existing Democrat district, in accord with the objective to create a "3-1 map" that increased the number of Republican seats by three and Democrat seats by only one. The fact that creation of an HCVAP-majority district also fulfilled a political goal does not mean that the district was not created with race as the predominant consideration. The Court thus finds that race predominated in the drawing of CD35 and that strict scrutiny applies.[39]

---

[38] Downton and the Republican-dominated Legislature used the intentional creation of a Hispanic-majority district that extended in large part into Travis County to justify its destruction of Travis County-based CD25, which it knew had a substantial minority population that was successfully electing its candidate of choice, a Democrat. Because the Court finds below that CD35 is an invalid district under *Shaw*, it does not reach the Rodriguez Plaintiffs' alternative argument that CD25 was a protected crossover district and that its destruction also violated the Equal Protection Clause.

[39] Judge Smith contends that because mapdrawers had a political motive, race did not predominate in the drawing of CD35. While this Court agrees with Judge Smith that, ultimately, many issues in this case boil down to "whether the congressional lines in the challenged districts were drawn for racial or partisan purposes," the Court still must conclude from the evidence that the congressional lines in CD35 were drawn for racial reasons, even if the ultimate location of CD35

was based in part on the partisan goal of unseating Doggett. In fact, the Court agrees that mapdrawers viewed the central Texas configuration as a "threefer" in terms of fragmenting Travis County, unseating Lloyd Doggett, and creating a Latino opportunity district along the Austin/San Antonio I-35 corridor. That the first two goals were furthered by placing the new Latino opportunity district in part in Austin does not undermine the conclusion that race predominated in the drawing of CD35.

It is undisputed that mapdrawers intended CD35 to be a Latino opportunity district, meaning it had to have over 50% HCVAP, and that this was the overriding criterion that could not be compromised in drawing the district. Downton admitted repeatedly to this being the ultimate criterion and to including population within and without the district for purely racial reasons, and traditional redistricting criteria were subordinated to race throughout the district. In that regard *Easley v. Cromartie* is easily distinguished and actually bolsters the Court's conclusion. In that case, the mapdrawers argued that they placed population into the district because they were Democrats, who also happened to be African-American, and that therefore politics, not race, shaped the district. The task was distinguishing a legislative effort to create a majority-African-American district from a legislative effort to create a safely Democratic district. *Easley*, 532 U.S. at 239. Here, in contrast, it is admitted that Downton placed population in the district because they were Hispanic, not because of their political characteristics. There was no argument or evidence that any population was included or excluded from the district based on partisan criteria (as distinguished from the political motive of using the race-based district to unseat Doggett). The fact that mapdrawers had the purpose of using CD35 to try to unseat Doggett and limit the number of Democrat districts statewide does not negate the fact that they used race as their tool and intentionally drew CD35 based predominantly on race. The political motive does not excuse or negate that use of race; rather, the use of race is ultimately problematic for precisely that reason—because of their political motive, they intentionally drew a district based on race in a location where such use of race was not justified by a compelling state interest.

As noted, to survive strict scrutiny, the challenged districting plan must be narrowly tailored to serve a compelling governmental interest. *Bush*, 517 U.S. at 976. Compliance with § 2 of the VRA constitutes a compelling governmental interest. *Id.* at 994 (O'Connor, J., concurring); *Clark v. Calhoun Cty.*, 88 F.3d at 1405. However, Defendants must do more than simply assert that they were attempting to comply with the VRA to survive strict scrutiny. "[T]he State must have a strong basis in evidence for concluding that the three *Gingles* preconditions exist in order to claim that its redistricting plan is reasonably necessary to comply with § 2." *Clark v. Calhoun Cty.*, 88 F.3d at 1405-06; *see also Shaw*, 517 U.S. at 915; *Bush*, 517 U.S. at 978 ("The State must have a 'strong basis in evidence' for finding that the threshold conditions for § 2 liability *[i.e.*, the *Gingles* preconditions] are present.").

Here, the Task Force Plaintiffs (who proposed a new Travis County/Bexar County Latino opportunity district during the legislative session) contend that CD35 is an appropriate § 2 district because it satisfies all *Gingles* criteria. *See* docket no. 460 at 16-18; docket no. 638 at 36.[40] The Task Force Plaintiffs offered some evidence in support of their position that the Hispanic populations of Travis and Bexar Counties are a community of interest that form a compact minority community for purposes of § 2. Defendants also argue that Southeast Austin and the

---

[40] In 2011, Defendants actually asserted that CD35 is not required by § 2; instead, they argued (as discussed) that racial considerations did not predominate in the drawing of the district. Docket no. 411 at 57 (ECF page 69). It is not clear whether Defendants maintained this position post 2014-trial.

Southside and Westside of San Antonio "are major urban areas sharing common interests" and "[i]t is not unusual for Austin and San Antonio to be combined in the same congressional district."[41] Docket no. 1272 at 125. Other Plaintiffs refute these assertions and contend that CD35 is not compact. The Rodriguez Plaintiffs further argue that CD35 is not properly drawn in Travis County because voting there is not racially polarized.

Although the Court is inclined to find that CD35 is not compact for § 2 purposes, it need not decide this issue because CD35 is invalid for another reason—there is no racially polarized voting in Travis County, such that the third *Gingles* precondition is not present in a significant portion of the district. *See Bush*, 517 U.S. at 979 (finding that challenged districts could not be considered narrowly tailored to avoid § 2 liability when one *Gingles* precondition was not fulfilled, even if the Court assumed the other two preconditions were met). Evidence from county-level elections shows substantial Anglo crossover voting and shows that the Anglo majority does not usually defeat the minority-preferred candidate. More importantly, as the history of benchmark CD25 demonstrates, Travis County Hispanic (and African-

---

[41] The Court notes, however, that Austin has also been joined with parts of Houston in a congressional district (in both the benchmark and the enacted plan), but obviously that fact alone does not mean that the minority community within the district is a compact minority community for § 2 purposes. The fact that the State chooses to combine certain communities in a non-racially (but politically) gerrymandered district does not mean that a different district that also combines parts of those communities is not racially gerrymandered or complies with § 2, or that the minority communities in a similar district are compact for § 2 purposes.

American) voters could be included in a non-racially gerrymandered district with an Anglo majority and still elect minority-preferred candidates because the Anglo majority did not vote to defeat the minority-preferred candidate. Therefore, there was no strong basis in evidence to include Travis County Hispanic voters in a racially gerrymandered district because they had no § 2 right to remedy; inclusion of Travis County Hispanic voters based on their race was not narrowly tailored to serve a compelling state interest.[42]

Mapdrawers and the Legislature may have had a strong basis in evidence for believing that § 2 required seven Latino opportunity districts in South/West Texas, but they had no basis in evidence to believe that the *Gingles* preconditions were satisfied in Travis County such that a race-based majority-Hispanic district should be drawn there.[43] There is no § 2 violation in Travis

---

[42] *See also Moon v. Meadows*, 42 952 F. Supp. 1141, 1150 (E.D. Va.), *aff'd sub nom. Harris v. Moon*, 521 U.S. 1113 (1997) (finding that racially gerrymandered minority district failed to survive strict scrutiny because defendant failed to show that Anglo bloc voting usually defeated the minority-preferred candidate and district's compactness was doubtful); *Harris*, 159 F. Supp. 3d at 623 (noting that a failure to establish any of the three *Gingles* preconditions is fatal to defendant's assertion that a racially gerrymandered district is narrowly tailored to serve the compelling state interest of complying with the VRA).

[43] Rather, the Legislature heard testimony (from Rep. Dawnna Dukes, Rep. Elliot Naishtat, and Sen. Kirk Watson from Austin/Travis County) that Anglos, Hispanics, and African-Americans worked in coalition (*i.e.*, voting was not racially polarized) and that, despite their Anglo-majority status, Austin and Travis County regularly elected minority candidates of choice. Defendants' expert Dr. Alford testified that there was "no question" that there

County, and where there is no § 2 wrong there cannot be a § 2 remedy. *Shaw*, 517 U.S. at 916 (quoting *Growe v. Emison*, 507 U.S. 25, 40-41 (1993)). Just as a state may be in violation of § 2 if it draws a noncompact majority-minority district and the plaintiffs' proposed alternative districts would be compact, *see LULAC*, 548 U.S. at 429-31, a state may be in violation of § 2 if it draws a district that does not substantially address the § 2 violations or is otherwise not narrowly tailored to the State's professed interest in avoiding § 2 liability when compliant districts could be drawn. *Shaw*, 517 U.S. at 911, 915. *Cf. Miller v. Johnson*, 515 U.S. 900, 921 (1995) (compliance with the VRA cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws).

To be a compelling interest, the state must show that the alleged objective was the Legislature's actual purpose for the discriminatory classification and the Legislature must have a strong basis in evidence to support that justification before it implements the classification. If avoidance of § 2 liability is asserted to be the State's compelling state interest, "the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored." *Shaw*, 517 U.S. at 916. In other words, the legislative action should substantially address, if not achieve, the avowed purpose. *Id.* at 915.[44]

---

was not racially polarized voting in Travis County. Alford depo. (Joint Ex. J-43) at 255.

[44] Additionally, the challenged district "must not subordinate traditional districting principles to race substantially more than is

If a § 2 violation is proved for a particular area, it flows from the fact that individuals in that area have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *Shaw*, 517 U.S. at 917. There is no indication that mapdrawers or the Legislature drew CD35 in Travis County because they felt that Hispanic voters there had a § 2 right that needed a remedy. Rather, they drew CD35 as an HCVAP-majority district that extended into Travis County for the purpose of eliminating the existing district in which minorities and Anglos together elected a Democratic candidate (and to unseat that candidate). In this way, they were able to create the facade of complying with § 2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state.[45] Plaintiffs have shown, and mapdrawers were

---

'reasonably necessary' to avoid § 2 liability." *Bush*, 517 U.S. at 979. Of course, the State is not prohibited from drawing majority-minority districts *per se*, *Voinovich*, 507 U.S. at 155, nor does § 2 prohibit the creation of a non-compact majority-minority district, *LULAC*, 548 U.S. at 430, but if the State allows race to predominate the drawing of a majority-minority district such that strict scrutiny is triggered, its race-based districting must be narrowly tailored to serve a compelling state interest.

[45] Downton testified that he did not think CD35 was necessary for § 5 compliance, and he was not sure if it was required by § 2, but he thought a court might find it was required by § 2. Tr987-88; Downton 8-12-11 depo. (Ex. J-62) at 113-14 (stating that CD35 was not required by § 5 and he was not sure if it was required by § 2 because it was "just minimally a majority Hispanic district" and he felt that drawing it was maximizing Hispanic opportunity districts); TrA1636-38, TrA1696-97 (stating his position that enacted CD23 was the same as

in the benchmark, a not-performing Latino opportunity district, such that there was no retrogression, but "even if it turned out that it was a Section 5 district and became not a Section 5 district, we had a replacement district, so there wasn't additional Section 5 analysis"). He testified that he was the one who "made the call" on these issues, including whether CD23 counted as a § 5 district. TrA1639-40. He also testified that he had been instructed to draw a new § 2 district in the plan, and when he saw MALDEF's proposal that included the district extending into Travis County, he decided to use that district. There is no indication that he had any evidence, much less a strong basis in evidence, to support the inclusion of Travis County in the new § 2 district when he decided to place the district there. Rather, he chose that location to fulfill the goal of drawing a new § 2 district while drawing a "3-1 map" that had only one new Democrat district. TrA1769 (Downton) (noting that CD35 would be a Latino opportunity district and it replaced a "different Democratic district" (CD25)); TrA1782 ("With respect to having the Democrat elected to Congress, there was not likely to be one elected from 25. There would be one elected from 35."); TrA1809 ("It was the issue of Democratic district. We created two new minority districts, but took away one non-minority Democratic district.").

Further, there is no evidence that any member of the Legislature, including Chairmen Solomons and Seliger, had any basis in evidence for believing that CD35 was required by § 2 other than its HCVAP-majority status. Solomons repeatedly stated that he relied on his staff, primarily Downton, to make legal determinations for him, and Downton repeatedly testified that his sole criteria for a § 2 district was whether it was above 50% HCVAP. Both Downton and Solomons indicated that CD35 was created because it could meet the majority-HCVAP threshold (and fulfill the 3-1 map goal), not because all of the *Gingles* factors were satisfied. Solomons depo. (Ex. J-60) at 134-36 (noting that the proposed DFW district was rejected because it did not meet the 50% threshold and the MALDEF proposal was selected because it could meet the threshold); *id.* at 143 ("it just seemed to me that that central part, that part of Texas made a good place for a district, if the numbers worked"). Solomons apparently believed that Seliger's staff was more knowledgeable about the Congressional plan than his own staff because the plan was initially

aware, that seven Latino opportunity districts could be drawn in South/West Texas without including Travis County. The Legislature's objective in drawing CD35 in Travis County was not to remedy a § 2 violation but to eliminate a Democratic district to offset the required creation of a new § 2 district, and the use of race for political advantage rather than compliance with the VRA cannot survive strict scrutiny. CD35 therefore violates the Equal Protection Clause and, as will be discussed, Plan C185 does not "substantially address" the § 2 violation in South/West Texas.

4. CD27/Nueces County § 2 claims

The Legislature's decision to place CD35 in Travis County ties into Plaintiffs' other claims that there is an unremedied § 2 violation for Hispanic voters in Nueces County, which was placed into Anglo-majority CD27. In *LULAC v. Perry*, the Supreme Court reemphasized[46] that creation of a district not required by § 2 (because it was not compact for § 2 purposes) could not remedy a § 2 violation elsewhere in the state. Though a § 2 plaintiff does not always have a right to be placed into a minority opportunity district as a remedy, and the State retains broad discretion in drawing districts to comply with the mandate of § 2, these principles have limits. *LULAC*, 548 U.S. at 429. The State may "use one majority-minority

---

released by the Senate, even though his own counsel Ryan Downton was the primary architect of the Congressional plan. *Id.* at 151-52.

[46] The Supreme Court previously held in *Shaw* that even if a state legislature has a strong basis in evidence for determining that a § 2 violation exists in one part of the state, it cannot remedy that violation by drawing a majority-minority district in a different part of the state. *Shaw*, 517 U.S. at 916.

district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." *Id.* "Simply put, the State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Id.* at 430.

In this case, the State intentionally created a § 2 majority-Latino district that included substantial population (215,626 persons in Travis County, 21% of the district's population) that did not have a § 2 right because the third *Gingles* precondition (Anglo bloc voting) does not exist in Travis County. Travis County minority voters could be included in an Anglo-majority district (such as benchmark CD25) and still elect their preferred candidate. At the same time, Plaintiffs demonstrated that approximately 200,000 Hispanic voters in Nueces County (a majority-HCVAP county) had a § 2 right that could be remedied but was not.

Numerous maps showed that seven compact Latino opportunity districts could be drawn in South/West Texas and that Nueces County Hispanics could be included in one of those districts for § 2 purposes.[47] Instead, they were placed in an Anglo-majority district where they have no opportunity to elect their preferred candidates. Thus, by including Hispanic voters in Travis County (who did not have a § 2 right) in CD35 but excluding Nueces County

---

[47] Plans were submitted during the legislative session and during this litigation that showed that seven compact districts could be drawn that included all or most Nueces County Hispanic voters but not Travis County voters (*see, e.g.*, Plans C123, C163, C164, C201, C208, and C220).

Hispanics (who did have a § 2 right) from a Latino opportunity district, Plan C185 does not "substantially address" the § 2 liability in South/West Texas. *Shaw*, 517 U.S. at 915 ("the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored"); *Dillard v. City of Greensboro*, 946 F. Supp. 946, 956 (M.D. Ala. 1996) ("Because the State has a compelling interest only in remedying the § 2 violation, a plan would be narrowly tailored and thus survive strict scrutiny only if it substantially addresses the [§ 2] liability . . . .") (internal quotation marks omitted); *see also Wilson v. Jones*, 130 F. Supp. 2d 1315, 1322 (S.D. Ala. 2000), *aff'd sub nom. Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000) (discussing *Shaw's* requirement that the district restore rights to the specific persons affected by the potential violation).

Defendants argue that the reconfiguration of CD27 and the creation of CD34 preserves the core of former CD27 and makes it more likely to perform. Docket no. 411 at 32. However, that argument ignores the § 2 rights of Nueces County Hispanic voters and Supreme Court precedent. Defendants' expert Dr. Alford noted that what happened to the Hispanic voters in Nueces County was similar to what happened to Hispanic voters in CD23 during the 2006 redistricting—a majority-Hispanic district that would likely have elected the Hispanic-preferred candidate was flipped into an Anglo-majority district to protect a candidate that was not preferred by the Hispanic voters. Tr1829, Tr1832, Tr1837 (Alford). The Supreme Court found that to be a violation of § 2 for the Hispanic voters who no longer had an opportunity to elect because they were no longer part of a Hispanic voting majority. Increasing electoral ability or performance for

some voters in former CD27 cannot offset the loss of opportunity suffered by Nueces County Hispanic voters when *all* the voters' § 2 rights can be accommodated.

Although Defendants contend that there is no racially polarized voting in Nueces County, that claim is disproved by the evidence. Assuming that looking at Nueces County in isolation (as opposed to in a congressional district[48]) is the proper focus, all of the expert testimony on the issue showed the existence of racially polarized voting in Nueces County. Dr. Ansolabahere found very high Anglo voter cohesion in Nueces County, and Anglo support for minority-preferred candidates is very low; only about 10 to 15% of Anglo voters support minority-preferred candidates. TrA943 (Ansolabahere). Dr. Engstrom testified that the bivariate analysis of statewide elections from 2006 to 2010 revealed racially polarized voting in both general and primary elections in Nueces County. Tr503 (Engstrom); Engstrom Rebuttal Report (docket no. 307-1) at 7 & Table 2. In his original report (Joint Expert Ex. E-7), Dr. Engstrom found that Latinos are highly cohesive in support of Latino candidates with the Democratic party nomination in general elections—all five got strong support (all point estimates were >90% on the bivariate analysis). The only Latino Republican, Guzman, was not supported. Further, all Latino candidates in Democratic primaries received strong Latino support (78.4% (Noriega), 90.5% (Cruz), 95%

---

[48] *See Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 97 (5th Cir. 1994) (elections involving the particular office at issue are more relevant than elections involving other offices such that limited minority success in municipal elections did not demonstrate equal opportunity in county-wide elections).

(Yanez), 83.9% (Chavez-Thompson), and 91.5% (Uribe)). Latinos voting in Republican primaries did support the Latino candidate running for Railroad Commissioner (Carrillo, 84.2%), but not for Governor (Medina, 28.2%). *Id.* at 12-13.

Non-Latino voters provided little support to any of the five Latino candidates favored by Latino voters in general elections, according to the bivariate analysis (support ranged between 11.2% and 17.6%). They did support the only Republican candidate that was a Latino (Guzman) with an estimated 78%. They did not provide majority support to any of the Latinos seeking nominations in the Democratic primaries and did not favor either Latino candidate in the Republican primaries (10.3% for Medina and 21.8% for Carrillo). Dr. Engstrom concluded that Latinos in Nueces County are very cohesive in their candidate preferences for Latino candidates, in both general elections and Democratic primaries, but their preferences were not shared by non-Latino voters in any elections analyzed. *Id.* at 13.

Engstrom's rebuttal report has similar findings: Latino voters in Nueces County "have been strongly cohesive in their support of Latino candidates with the Democratic Party nomination in general elections." Docket no. 307-1 at 5. All seven such Latino candidates received "strong support" from Latino voters—each candidate received over 90% of the Latino vote, with the range being from 90.1% to 97.8%. *Id.* at 6. In none of the elections analyzed did non-Latino voters share that preference, and their support ranged from 7.5% to 17.6%. *Id.* All of the Latino candidates in the Democratic primaries "also received strong support from the Latino voters in Nueces County." *Id.* Their estimated support

range was 78.4% to 96%, with four of the six exceeding 90%. *Id.* Non-Latinos did not provide majority support in any of these primaries, with their support estimates ranging from 29.7% to 46.6%. *Id.* In the 2010 Republican primary for Railroad Commissioner, Latinos supported the Latino incumbent with 84.3% support, while non-Latinos did not support him (21.8%). *Id.*[49]

To the extent Defendants have argued that racially polarized voting is not legally significant when Latino cohesion falls below 80% or Anglo crossover voting is significant, *see, e.g.*, docket no. 411 at 49-50; docket no. 1276 at 92 (proposed FF 860: "Plaintiffs have failed to demonstrate that racially polarized voting in any Texas county is legally significant."), the level of racial bloc voting in Nueces County is legally significant even under Defendants' standards.[50] In addition, to the extent

---

[49] In the 52-county area he defined as South Texas, Dr. Engstrom also found racially polarized voting. Tr503. He found Latino cohesion for the Latino candidate with the Democratic Party nomination exceeding 80% (the range was 80.5% to 88.5%) while non-Latinos ranged in support between 13.1% and 19.1%. Docket no. 307-1 at 7. In addition, Latino candidates in the Democratic primaries also received "strong support" estimated to be greater than 80% (ranging from 76.8% to 93.5), with non-Latinos providing between 26.1% and 39.11% support. In the 2010 Republican primary for Railroad Commissioner, Latinos provided 69.73% support and non-Latinos provided only 25.5% support. *Id.* at 8.

[50] Defendants have not challenged Dr. Engstrom's qualifications, methodologies, or results. Dr. Alford stated that Dr. Engstrom's EI methodology was good and that his report was credible. Tr1765, Tr1859; Alford depo. (Joint Ex. J-43) at 111-12. Dr. Engstrom's data, in addition to the other expert data, demonstrate the existence of legally significant polarization sufficient to satisfy *Gingles*. Dr. Alford acknowledged that there was significant variation in Hispanic voter cohesion across the state. Tr1785, Tr1848. Dr. Engstrom's analysis

Defendants assert that the cause of polarized voting is partisanship and not race, Plaintiffs have sufficiently rebutted that evidence by showing that voting is sufficiently racially polarized in the primaries, where partisanship plays no role. Specifically, Latinos were highly cohesive (84.3%) in support of the Latino candidate Victor Carrillo (the incumbent) in the 2010 Republican Primary for Railroad Commissioner, while non-Latinos provided only 21.8% support, and Carrillo was defeated.[51] In addition, although voting is not as racially polarized in the Democratic primaries, Latino cohesion remains high (ranging from 78.4% to 95% in regular primaries and reaching 96% in the 2006 runoff for Lt. Governor) and although non-Latino/Anglo crossover voting is higher (ranging from 29.7 to 46.6%), non-Latinos did not provide

---

shows that Latino voters in Nueces County were consistently cohesive in the 90% range, while non-Latino voters were highly cohesive in voting for the non-Latino-preferred candidate and provided weak support to the Latino-preferred Latino candidate (between 7.5 and 17.6%) in the 2006, 2008, and 2010 general elections he studied. Engstrom Corr. Rebuttal Report (docket no. 307-1) at 32 (Table 2). Dr. Alford stated that such levels of bloc voting were legally significant. Tr1846.

[51] In his 2014 supplemental report, Dr. Engstrom found that in the Republican primary runoff election for Texas Supreme Court Place 4, 68.6% of Latino voters support Medina, while 34.4% of non-Latino voters did. TrA481 (noting that he found polarized voting in some counties but not others in this election); PL-967. He did not find racially polarized voting in the Cruz Republican primary election, but he also noted that Latinos did not support Cruz in the general election either, and there are such low participation rates by Latinos that it did not provide effective analysis. TrA482. He also noted that none of the results of his 2012 analysis altered his prior conclusions regarding racially polarized voting since that analysis was more extensive in terms of the number of elections analyzed.

majority support to the Latino-preferred Latino candidate in any of the primaries Engstrom evaluated.

Dr. Engstrom also found high Latino cohesion in the HD33 election in 2010, with Solomon Ortiz, Jr. receiving an estimated 92.3% of the Latino vote, while non-Latinos provided only 11% support. Docket no. 307-1 at 25; Tr510 (Engstrom). Dr. Kousser also found that contests in HD33 between 2002 and 2010 were "starkly racially polarized," with Latino voters overwhelmingly supporting the Democratic candidates. Joint Expert Ex. E-2 (Kousser report) at 87 n.55, Tables 12-14.[52]

Dr. Brischetto similarly found racially polarized voting in the 2012 HD34 election in Nueces County[53] as well "a high degree of racially polarized voting between Latinos and non-Latinos" in the other elections analyzed. TrJ937-38 (Brischetto). Dr. Brischetto analyzed ten general elections in Nueces County in 2012 and characterized the racially polarized voting between Latinos and non-Latinos as "extreme." TrJ992; Brischetto Report (MALC-161) at ¶ 48. Dr. Brischetto found that Latinos had a high level of cohesiveness, with

---

[52] Table 14 shows Kousser's results using ecological inference. In 2002, Latinos supported Luna with 97.3% of their vote, while non-Latinos provided majority support (63.5%) to Cuellar. In 2008, Latinos supported Ortiz with 93.2% of their vote, while non-Latinos provided majority support (66.6%) to Torres. In 2010, Latinos supported Ortiz with 86.3% of their vote while non-Latinos provided strong support (89.6%) to Torres. Tables 12 and 13 (reflecting the results of other methodologies) display similar results.

[53] Latino support for Herrero, the Latino candidate, was 95.55% while non-Latino support was 11.09%. Non-Latino support for Scott, the Anglo, was 88.91%, while Latino support for Scott was 4.45%. TrJ937 (Brischetto); Brischetto Report (MALC-164) Table 4.

their support for the minority/Latino candidate above 90% in nine of ten general elections. TrJ969 (Brischetto); Brischetto Report Table 4. He also found that Anglo bloc voting was sufficient to usually defeat the Latino-preferred candidate. *Id.*; MALC-164.

Although Dr. Brischetto did not find extreme differences and did not think voting was racially polarized in the Democratic primary for CD27, he did find racially polarized voting in the race for Democratic Party Chair, where Latinos supported the Latino candidate with 90% of their votes and non-Latinos supported the non-Latino candidate with 60% of their votes. TrJ944; Brischetto Report ¶ 50, Table 4. He also found racially polarized voting in three of five Republican primary elections. TrJ942-43; Report ¶ 49, Table 4. Those three elections involved head-to-head contests between a Latino and non-Latino candidate, while the other two involved three or more candidates. TrJ943 (Brischetto); Brischetto Report Table 4.[54]

Defendants fail to cast doubt on any of these findings and conclusions. Instead, Defendants contend that there is no racially polarized voting because minority-preferred candidates have won a number of elections in Nueces County. Accordingly, Defendants contend that the third *Gingles* factor—that the Anglo majority votes sufficiently

---

[54] In the Senate primary, Latinos split their vote primarily between Cruz, the Latino candidate (41.77%), and Dewhurst (42.35%) and there was a fairly large error range. TrJ939 (Brischetto). In the Supreme Court Place 4 race, Latinos supported Medina with 69.5% of their votes but Anglos supported Medina with 36.21% of their vote and Devine with 43.19% of their vote, leading Dr. Brischetto to say that although voting was racially polarized, he would not call it highly racially polarized. TrJ941.

as a bloc to enable it usually to defeat the minority-preferred candidate—is absent. However, in those elections, minorities had a sufficiently large majority to overcome the Anglo bloc voting. Dr. Brischetto explained that the minority candidate does win when the district is over 66% minority. TrJ996 (Brischetto). In districts that were less than 50% minority, however, Anglo bloc voting defeated the minority-preferred candidate all but one time. *Id.*. The fact that minority candidates can win when they have a super-majority does not disprove the existence of racially polarized voting.

Moreover, looking instead at a district level[55] (as opposed to the county in isolation), placement of Nueces

---

[55] Dr. Engstrom found racially polarized voting in the 2010 general election for CD27. Tr510 (Engstrom); Engstrom Corr. Rebuttal Report (docket no. 307-1) at 25. The incumbent Ortiz received an estimated 86.6% of the votes cast by Latinos and only 15.9% of those cast by non-Latinos. *Id.*; Tr509-10 (Engstrom). Dr. Kousser also found racially polarized voting in the 2010 general election for CD27 using various methodologies. Tr226 (Kousser) (noting that, using ordinary least squares method, Latinos voted 85% for Ortiz and only 13.4% for Farenthold) (Joint Expert Ex. E-2 at 42-44, Table 12) (non-Latino support for Ortiz was 8%); Joint Expert Ex. E-2 at 45-47, Table 13 (using least squares weighted by votes, Ortiz received 81.9% of Latino support and 9.3% of non-Latino support); Joint Expert Ex. E-2 at 48-50, Table 14 (using ecological inference method, Ortiz received 80.6% of Latino vote and 10.7% of non-Latino vote, and Latinos provided only 12.4% support for Farenthold). Using homogeneous precinct analysis, Dr. Ansolabahere also found racially polarized voting in the 2010 general election for CD27, and found that it was greater in that race, which involved an Anglo Republican and a Hispanic Democrat, than the 2010 gubernatorial race between two Anglo candidates, indicating that race played a role in addition to partisanship. Joint Expert Ex. E-15 at 36. Benchmark CD27 was a Latino opportunity district, and the § 2 rights of those Hispanic voters

County Hispanics in an Anglo-majority district ensures that the Anglo majority usually will defeat the minority-preferred candidate, given the racially polarized voting in the area, and thus those Hispanic voters lack opportunity. CD27 in Plan C185 is a district in which Latino voters have no opportunity to elect their preferred candidates. In contrast, past performance of benchmark CD27 (as well Plaintiffs' proposed plans) demonstrates that Nueces County can be placed in a majority-HCVAP district that provides Latino opportunity.

Plaintiffs have thus shown that a district could be drawn in which Hispanics, including Nueces County Hispanics, are sufficiently numerous and geographically compact to constitute a majority HCVAP. They have also shown that racially polarized voting exists such that an Anglo-majority would usually defeat their preferred candidate. They satisfy the *Gingles* preconditions, and a consideration of the totality of circumstances leads the Court to conclude that they have a § 2 right. A searching practical evaluation of "past and present reality" and a functional view of the political processes indicates that the political processes are not equally open to Hispanics. Texas's history of official discrimination touching on the right of Hispanics to register, vote, and otherwise to participate in the democratic process is well documented and has been discussed above. Similarly, as discussed, the evidence indicates that Latinos bear the effects of past discrimination in areas such as education and

---

in Nueces County were intentionally taken away to protect the Republican incumbent. *See* Tr514 (Engstrom) (noting CD27's past performance).

employment/income, which hinder their ability to participate effectively in the political process.[56]

The challenged district CD27 has the effect of diluting Nueces County Hispanic voters' electoral opportunity—that is in fact why the State chose to put those voters in an Anglo-majority district, to protect an incumbent who was not the candidate of choice of those Latino voters. Although Defendants assert that some people wanted Nueces County to anchor its own district, see docket no. 1272 at 127, the Court finds that the primary and dominant motive was to place the incumbent Farenthold, who lived in Nueces County and would likely be ousted by the existing Latino majority, into an Anglo-majority district (and thus to take away the opportunity to elect that Nueces County Latinos had enjoyed). *See, e.g.*, Downton 8-31-11 depo. (Joint Ex. J-62) at 49 ("Q. What was the purpose of including Nueces County in Congressional District 27 in the enacted plan? A. Congressman Farenthold lives in Nueces County. We were trying to draw him into a Republican district."); Seliger depo. (Joint Ex. J-59) at 25-26 (noting that joining

---

[56] In Nueces County, the mean family income and the mean household income for Anglos is almost twice that of African Americans and Hispanics. MALC-149. Hispanics and African Americans are several times more likely to rely on food stamps. *Id.* The per capita income for Anglos is more than three times that of Hispanics and almost three times that of African Americans. *Id.* More than 86% of the Nueces County functionally illiterate persons over 25 are Hispanic. MALC-150. 16.3% of Hispanics over the age of 25 are functionally illiterate, compared to 2.6% of Anglos. *Id.* Almost one third of Hispanics over the age of 25 are not high school graduates, compared to 8.3% of Anglos. *Id.* 11.4% of Anglos over 25 have graduate or professional degrees, compared to 4% of Hispanics. *Id.*

Nueces County with counties to the north was to try to help Farenthold hold the district). As discussed previously, incumbency protection does not permit the dominant party to ignore § 2 or to dilute Latino voting power because the Latino voters would not favor the incumbent candidate.

Even if incumbency protection must be considered or weighted equally with § 2 obligations to avoid Equal Protection Clause issues (which the Court does not decide), Defendants failed to show that both considerations could not be accommodated in the plan. They never explored this option; they made the decision to place all of Nueces County in an Anglo district going to the north from the beginning of the process. TrA1772-73 (Downton) (directive to put Nueces County in a northern-oriented district was given "[f]rom the beginning of the process"). Several plans (*e.g.*, Plans C126, C164, C187, C225) demonstrate that the political goal of protecting Farenthold could be accommodated along with the § 2 rights of most Nueces County Hispanics, and the neighboring district(s) would not extend so far north. Numerous maps also demonstrated that accommodating the § 2 rights of all or most Nueces County Hispanic voters would not compromise the § 2 rights of any other voters, and in fact including it substantially accommodates the § 2 rights of Hispanic voters in South/West Texas.

Where the rights of voters who have demonstrated § 2 violations can be accommodated through the use of compact districts that do not subordinate traditional redistricting principles more than necessary to address the § 2 liability, those voters' § 2 rights must be accommodated. This is not a case in which Plaintiffs are

asserting that their districts are simply preferable, that the State did not get things "just right," or in which Nueces County Hispanics' § 2 rights could not be accommodated along with other voters with § 2 rights. *See Bush v. Vera*, 517 U.S. 952, 977-78 (1996) (noting that a § 2 district that is reasonably compact and regular, taking into account traditional districting principles, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests"); *LULAC*, 548 U.S. at 429 (the state may use one majority-minority district to compensate for the absence of another only when the racial group in each district has a § 2 right but they could not both be accommodated; if the inclusion of the plaintiffs would necessitate the exclusion of others, then the State cannot be faulted for its choice).

To the extent the desire for Nueces County to anchor a district did play a small role, that desire must yield to the requirements of the VRA, especially where, as here, Hispanic voters compose more than 50% of the County's CVAP (and that percentage is increasing) and the decision to remove Nueces County from its existing configuration led to other questionable race-based decisions, such as CD34 stretching from Cameron County all the way to Gonzales County and CD15 stretching from Hidalgo County to Guadalupe County in an effort to "pick up Anglo voters."[67] Accordingly, Plaintiffs have amply

---

[67] *See* US-76 (Opiela email to Interiano noting that there was a "ripple effect" from putting Nueces County in a northern Anglo-majority district that would cause mapdrawers to create a South Texas district stretching far north to "pick up Anglo voters" to avoid a packing claim); TrA345 (Interiano) ("I believe that what we had discussed was that if Nueces County went north and you took that

demonstrated that Nueces County Hispanics have a § 2 right that has not been remedied in Plan C185, but could be remedied without the loss of a § 2 remedy for others (and without the Equal Protection Clause violation that exists in CD35 and potentially the South Texas districts in Plan C185).[58]

5. Summary

In sum, Plaintiffs have established a § 2 violation, both in terms of intent and effect, in South/West Texas. Plaintiffs have shown that seven compact majority-HCVAP districts could and should be drawn there that would substantially address the § 2 rights of Hispanic voters in South/West Texas, including Nueces County. Defendants' decision to place Nueces County Hispanic voters in an Anglo district had the effect and was intended to dilute their opportunity to elect their candidate of choice. Meanwhile, race predominated in the drawing of CD35, and Defendants' decision to place majority-HCVAP CD35 in Travis County was not to comply with the VRA but to minimize the number of Democrat

---

population to a district going north . . . the concern was that any district south of that, there was a risk of it being considered packing.").

[58] The Court notes that, although its finding that CD35 violates the Equal Protection clause under a *Shaw*-type analysis is related to and supports Plaintiffs' § 2 claim in Nueces County, the claims are independent. The Task Force Plaintiffs support CD35 but still assert § 2 claims on behalf of Nueces County Hispanic voters. Therefore, even if the Rodriguez Plaintiffs are no longer pursuing a *Shaw*-type claim concerning CD35, the Court still concludes that Plaintiffs have demonstrated that the Nueces County Hispanics have established a § 2 violation insofar as they have shown that their § 2 rights could have been accommodated but were not.

districts in the plan overall. Plaintiffs have established an equal protection violation with regard to CD35. Defendants' manipulation of Latino voter turnout and cohesion in CD23 denied Latino voters equal opportunity and had the intent and effect of diluting Latino voter opportunity. Nueces County Hispanics and Hispanic voters in CD23 have proved their § 2 results and intentional vote dilution claims. The configurations of CD23, CD27, and CD35 in Plan C185 are therefore invalid.

II. Dallas-Fort Worth area

In the DFW area, Plaintiffs assert § 2 intentional vote dilution and results claims, Fourteenth Amendment racial discrimination claims, and Fourteenth Amendment *Shaw*-type racial gerrymandering claims. In support of their claims, Plaintiffs contend that the one existing African-American opportunity district (CD30) was unnecessarily and intentionally packed with minority voters and that the rest of the minority populations in Dallas and Tarrant Counties were intentionally fragmented ("cracked"). Plaintiffs assert that, had the Legislature not intentionally fragmented the minority population to avoid creating what it viewed as a district that would elect Democrats, there would "naturally" be additional minority opportunity districts in the area. Thus, a primary complaint is the Legislature's failure to create one or two new minority opportunity districts (either single-minority or coalition) in DFW, and its intentional avoidance of such districts. The Task Force plaintiffs also contend that, regardless of intent to help or hurt minorities, race predominated in the decision to include populations in districts throughout DFW, but

primarily in CD26 in Tarrant County and in CD6 in Dallas County, in violation of the *Shaw* line of cases on racial gerrymandering.

Defendants contend that politics, not race, was the metric used to draw lines in DFW, and although they concede that race was used to some degree in districts CD12 and CD26, Defendants contend that this use of race was not discriminatory and did not violate the Equal Protection Clause under a *Shaw*-type inquiry. With regard to the § 2 results claim, Defendants argue that the Hispanic population in DFW is not sufficiently geographically compact to create a § 2 Latino opportunity district because the HCVAP population is too small and too dispersed, and that it was not required to draw a coalition or other minority district, which would elect a Democrat.[59] And because no majority-minority district was required, Defendants contend, mapdrawers were free to engage in political gerrymandering that had the unsurprising and foreseeable (but not intended) effect of dividing minority communities.

The Court will begin its analysis with Plaintiffs' traditional § 2 results claims under *Gingles*. Because the Court finds that Plaintiffs' results claims regarding the failure to draw one additional minority coalition district are moot and that Plaintiffs have failed to provide sufficient evidence to support their other § 2 results

---

[59] *See* TrA205-06 (opening arguments); proposed fact finding 644 (docket no. 1276) ("The Legislature viewed the creation of coalition districts as Democratic districts and they did not have the goal of creating additional Democratic congressional districts unless it was required to do so under the Voting Rights Act.").

claims at this time, it must consider the constitutional claims.[60]

A. Whether Plaintiffs can satisfy *Gingles* for an additional Latino opportunity district?

To satisfy the *Gingles* preconditions for a new Latino opportunity district in a traditional vote dilution results case, Plaintiffs must show that Latinos are "sufficiently large and geographically compact to constitute a majority in a single-member district," and all parties agree that a majority is greater than 50% HCVAP for a Latino opportunity district. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality); *Thornburg v. Gingles*; 478 U.S. 30, 50 (1986); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999). Numerous maps were submitted to Downton and the Legislature for consideration during the session and as demonstration maps at trial, but Plaintiffs have failed to demonstrate that any contained a compact district that was majority-HCVAP.

1. Task Force Plan C190

The Latino Task Force has submitted Plan C190 (Joint Map Ex. J-11), which includes CD6, the only proposed HCVAP-majority district using 2005-2009 ACS data. Using that data, CD6 is 50.4% HCVAP (and 66.8% HVAP and 41.6% total SSVR). It joins Latino neighborhoods in the Fort Worth area with "several heavily Latino neighborhoods in the Dallas area, such as Oak Cliff and Grand Prairie, and the Latino populated

---

[60] Even if the Court did find for Plaintiffs on the results claims, consideration of the intentional vote dilution claims would likely still be necessary given the request for bail-in relief.

areas of Irving and Farmers Branch." Docket no. 482 at 55 (Task Force proposed fact finding 304); *see also* docket no. 1274 at 152 (Task Force proposed fact finding 1003: "Congressional District 6 in plan C190 unites Latino communities in Dallas and Tarrant Counties."). The Task Force asserts that this district takes in "similar neighborhoods" and would elect the Latino-preferred candidate in seven of seven racially contested general elections. Docket no. 1282 at 10.

The Task Force proffered some exhibits that show that CD6 encompasses many areas with 10% or higher population age 18 years and over who speak Spanish and speak English "not well" or "not at all" (PL-360), high percentages of population age 25 and over with less than a high school diploma (PL-361), and mostly areas with low (below $38,000) median household income (PL-362). Task Force exhibit PL-363 also shows that the contours of the district closely track areas with high Hispanic population, including virtually all areas in Tarrant County with 80% or higher Hispanic population and most such areas in Dallas County. Thus, the Task Force Plaintiffs assert, CD6 unites Latino communities, communities with low educational attainment, and low-income communities in Dallas and Tarrant Counties. Docket no. 482 at 54 (proposed FF 300-302).

Alex Jimenez, a Task Force individual plaintiff from Tarrant County, testified that proposed CD6 joins people, businesses, and consumer bases in Fort Worth and Dallas that are fairly similar. Tr574-75. He testified that people in Fort Worth and Jefferson/Oak Cliff in Dallas are very similar. Tr575. He thinks voters in the district communities would support the same candidate based on what the candidate represents, not on whether the

candidate is Republican or Democrat. Tr576. The Task Force also offers the Declaration of Hector Flores, a Dallas County resident, who notes that CD6 "reflects several predominantly Latino neighborhoods in the Fort Worth area," "several heavily Latino neighborhoods in the Dallas areas, such as Oak Cliff and Grand Prairie," and "Latino populated areas of Irving and Farmers Branch." PL-415 at ¶ 20. He stated that the schools in those areas are largely Latino and have large ESL populations, that the streets and transportation infrastructure are uniformly poor, the housing is typically low-to-middle-class-income housing with substantial multifamily housing, the Latinos in the areas largely work in construction or run small businesses, and the Latinos who reside in the areas reflected in this proposed district have much in common culturally, linguistically, and economically. PL-415 at ¶¶ 21-24.

Defendants argue that the district is not reasonably compact as required by *Gingles* because of its low compactness scores, its convoluted shape, and its many fingers and extensions. Tr56; Docket no. 411 at 28; Docket no. 457 at 22. Defendants' compactness expert Todd Giberson noted that CD6 had the worst compactness scores of all proposed demonstration districts he analyzed. Joint Expert Ex. E-18 at 6. It has an area rubber band score of .303 and a perimeter-to-area score of .018, both of which reflect very low compactness.[61] Joint

---

[61] As explained by the court in *Rodriguez v. Harris County, Texas*, 964 F. Supp. 2d 686, 740 (S.D. Tex. 2013), the area rubber band score measures the ratio of the area of the district to the area of the smallest convex polygon enclosing the district and symbolizes "how tightly packed or spread out the geography of a district is." "A long, narrow district, or one with 'fingers' or other extensions, is less

Map Ex. J-11. It is the only proposed district that is less compact using the area rubber band measurement than CD35 in the enacted plan, which is the least compact district in Plan C185. Giberson 2011 depo. (Joint Ex. J-42) at 40-41. However, using the area-to-smallest-circle measurement, CD6 is more compact than CD35 in Plan C185. *Id.*

To satisfy the first *Gingles* precondition, Plaintiffs must prove that their demonstration district contains a majority HCVAP and that the minority population in the district is "geographically compact." *Gingles*, 478 U.S. at 50. The § 2 compactness inquiry considers the compactness of the minority population, not the compactness of the contested district or necessarily the precise shape of its boundaries, though as discussed below the shape of the district is relevant. *LULAC v. Perry*, 548 U.S. 399, 433 (2006). In other words, the Court should focus on the size and concentration of the minority population. *Houston v. Lafayette Cty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995).

If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district, and a district that reaches out to grab small and apparently isolated minority communities is not reasonably compact. *Bush*, 517 U.S. at 979; *LULAC*, 548

---

compact because it takes a large circle to enclose the entire district, yet much of that circle is empty." *Id.* Perimeter-to-area compares the relative length of the perimeter of a district to its area. *Id.*; *see also LULAC v. Perry*, 548 U.S. 399, 455 n.2 (2006). "Jagged district borders substantially lengthen the boundary without enclosing more area and hence score low." *Rodriguez*, 964 F. Supp. 2d at 741.

U.S. at 432. However, members of a racial group in different areas could share similar interests and therefore form a compact district "if the areas are in reasonably close proximity." *LULAC*, 548 U.S. at 435. "A district would not be sufficiently compact if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived in the district." *Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 737-38 (S.D. Tex. 2013) (citing *Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 96 (5th Cir.1994) (noting that "[a] number of courts have concluded that the first *Gingles* precondition is not satisfied if the proposed district does not retain a natural sense of community such that it can be effectively represented")).

Further, the § 2 compactness inquiry must take into account traditional districting principles such as maintaining communities of interest and traditional boundaries. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (citing *Bush v. Vera*, 517 U.S. 952, 977 (1996)); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1391-92 (E.D. Wa. 2014) ("The compactness inquiry under § 2 . . . focuses more generally on whether the proposed minority district reasonably comports with 'traditional districting principles' such as contiguousness, population equality, maintaining communities of interest, respecting traditional boundaries, and providing protection to incumbents."). "The recognition of nonracial communities of interest reflects the principle that a State may not 'assum[e] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *LULAC*, 548 U.S. at 433. Thus, to evaluate geographical compactness, the Court considers the dispersion of the relevant minority

population, the shape of the proposed district (as measured by a visual evaluation and by statistical measures of compactness), and the district's compliance with traditional redistricting principles (such as respect for communities of interest and traditional boundaries). *See Rodriguez*, 964 F. Supp. 2d at 737-54; *see also Vera v. Richards*, 861 F. Supp. 1304, 1341 (S.D. Tex. 1994) (noting that a district's compactness must be a relative measure based on location and population density and that "[i]n a major urban county, compactness makes little sense if considered in terms of geographic sprawl alone, but it seems far more probative when viewed in terms of a city's or county's neighborhoods, geopolitical subdivisions, and business location"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).

The Court agrees with Defendants that the proposed district indicates that the HCVAP population is not sufficiently geographically compact to satisfy the first *Gingles* precondition. The evidence shows that, although the Hispanic population in Dallas and Tarrant Counties has grown, neither county was above 25% HCVAP at the time of redistricting, and neither county contained sufficient HCVAP population to form the majority of a district solely within that county. *See, e.g.*, TrA1237-38 (Korbel); D-231. As a result, the proposed CD6 joins, by a long narrow strip, a significant portion of Fort Worth to various areas of Dallas and Dallas County. Although the western portion of the district is mostly populated by Fort Worth residents, it includes small portions of Haltom City, Sansom Park, Lake Worth, and River Oaks, and has several large tentacles rather than a compact shape. One who drove in a circle within Fort Worth could exit and enter the district ten or more times. This portion of the

district does not appear to have a natural sense of community.

As noted, CD6 then connects this Fort Worth-area population to other Latino population in Dallas County via a long, narrow strip no wider than a block or a highway at points. Once within Dallas County it takes only select portions of Grand Prairie, reaches north and juts into portions of Irving via highly irregular lines that do not appear to respect any traditional boundaries, then narrows and again employs bizarre shapes to take additional Irving population, Dallas population, as well as parts of Farmers Branch and Carrollton. Elsewhere, it narrows through central Dallas and then extends a long, jagged protrusion east throughout parts of Dallas and picks up part of Balch Springs. The district has very little integrity in terms of traditional boundaries or districting principles within Dallas County and does not appear to retain a natural sense of community.

Overall, the district shows no regard for traditional districting principles such as compactness or respecting county lines, towns, cities, or voting precincts. *See* docket no. 461-1 at 2 (Engstrom report) (noting that CD6 was drawn without regard to precinct boundaries). The Task Force asserts that the shape of CD6 "is not dictated solely by race at the expense of all other redistricting factors" and that DFW districts "are notoriously challenging to draw because of the existing African American opportunity district, CD30, and because of the demands of incumbents to protect their homes and district office locations." Docket no. 460 at 15. The Task Force argues that, for this reason, the State's plan "has very poor compactness scores in the Dallas-Fort Worth area" and "in light of the State's tolerance for less compact districts

in this region, and the lack of any evidence that Plaintiffs' CD6 follows boundaries other than communities of interest," the State cannot successfully challenge CD6 as noncompact. *Id.* However, it is Plaintiffs' burden to demonstrate compactness, especially in light of the district's visual non-compactness.[62] *Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 669 (5th Cir. 2009) ("plaintiffs bear the burden of proof in a VRA case, and any lack of record evidence on VRA violations is attributed to them"). Plaintiffs fail to demonstrate specifically how the cited factors play a role in the demonstration district's strange shape or that the district in general respects communities of interest and traditional boundaries.[63] The fact that the districts in Plan C185 may be noncompact due to various gerrymandering and incumbency factors does not demonstrate that CD6 is compact.

To be sure, the first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the population be sufficiently compact to constitute a majority in a single-member district. *Houston v.*

---

[62] *See Chen v. City of Houston*, 206 F.3d 502, 512 (5th Cir. 2000) ("[T]he district challenged in *Shaw* could be safely assumed not to have been driven by communities of interest, since it 'winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas' in an attempt to gather up 'enclaves ofblack neighborhoods' and 'even towns are divided.'") (quoting *Shaw v. Reno*, 509 U.S. 630, 635-36 (1993)).

[63] David Hanna testified that he was unable to draw a majority-HCVAP district that was more compact than a proposed district with "a lot of arms and tentacles" that may have been CD6, indicating that it is the dispersion of the HCVAP population and not other factors that cause its strange shape. TrA1576-77.

Lafayette Cty., Miss., 56 F.3d 606, 611 (5th Cir. 1995) (quoting *Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 95 (5th Cir. 1994)). But despite this directive and although Supreme Court precedent indicates that courts are to focus on the compactness of the minority community and not necessarily district borders when determining § 2 compactness, Justice O'Connor's plurality opinion in *Bush v. Vera* makes clear that "[d]istrict shape is not irrelevant." 517 U.S. 952, 980 (1996). Although her inquiry was whether the district at issue satisfied strict scrutiny, Justice O'Connor's plurality relied primarily on bizarre shape and noncompactness of district lines to conclude that the district was not compact and therefore not required by § 2.64[64]

---

[64] The Court is mindful that the compactness inquiry under § 2 and the purpose inquiry under a Shaw-type equal protection claim are distinct. *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996). As the Fifth Circuit noted, Plaintiffs typically attempt to show that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district by drawing hypothetical majority-minority districts; this is necessary to show that it is "the current districting scheme and not, for example, geographic dispersal that is the source of their disproportionately weak political strength." *Id.* at 1406. Thus, the *Shaw*-type claim's emphasis on purpose (specifically, whether race predominated and subordinated traditional redistricting principles) does not apply to the first *Gingles* precondition because "the first *Gingles* factor is an inquiry into causation that necessarily classifies voters by their race." *Id.* at 1406-07 (also noting that the Court has not suggested that a district drawn for predominantly racial reasons would necessarily fail the *Gingles* test). Accordingly, the Court does not accept Defendants' argument that CD6 must be rejected simply because it "would have likely raised a *Shaw* challenge" (proposed fact finding 647, docket no. 1276 at 70). In addition, the Court rejects the Task Force's argument that Defendants must show that the proposed district would violate

Justice O'Connor agreed with the district court's finding that the district had "no integrity in terms of traditional, neutral redistricting criteria." *Id.* at 960. She described the Dallas district at issue as having 50% of its population in a compact, albeit irregularly shaped, core in south Dallas, but "the remainder of the district consists of narrow and bizarrely shaped tentacles." *Id.* at 965 She wrote, "Over 98% of the district's population is within Dallas County, . . . but it crosses two county lines at its western and northern extremities. Its western excursion into Tarrant County grabs a small community that is 61.9% African-American; its northern excursion into Collin County occupies a hook-like shape mapping exactly on the only area in the southern half of that county with a combined African-American and Hispanic percentage population in excess of 50%." *Id.* The district court wrote,

> The district sprawls throughout Dallas County, deliberately excludes the wealthy white neighborhoods of Highland Park and University Park and extends fingers into Collin County, which include the outermost suburbs of Dallas. In Collin

---

Shaw. *See* docket no. 460 at 15 ("Although the State contests the compactness of Plaintiffs' demonstration CD 6 in Plan C190, it fails to explain how the shape of CD 6 would be an unconstitutional racial gerrymander.").

Nevertheless, *Clark* re-iterates that *Gingles* "insists upon a compact district" to establish § 2 liability. *Clark*, 88 F.3d at 1407. Further, *Shaw*-type cases that discuss whether a district that has been drawn by a legislature satisfies strict scrutiny in terms of complying with § 2 of the VRA—specifically, whether the state had a strong basis in evidence for believing that the *Gingles* preconditions were satisfied—are relevant.

> County, the district picks up a small African-American neighborhood. The district extends into Tarrant County only to pick up a small border area with a high African-American concentration. It also reaches out to claim Hamilton Park, an affluent African-American neighborhood surrounded by whites. Part of the district runs along Trinity River bottom, using it to connect dispersed minority population. Numerous [voter tabulation districts] were split in order to achieve the population mix required for the district. . . . It is at least 25 miles wide and 30 miles long.

Id. at 965-66 Although she used these facts to determine that race predominated over traditional districting principles in drawing CD30, Justice O'Connor also relied on them to determine that the district was noncompact. It is difficult to distinguish the Task Force's proposed CD6 from CD30 in the *Bush* case, which Justice O'Connor's plurality concluded was not compact and not required by § 2.

Although the Task Force proffered some evidence showing that the population included in the proposed district shares a community of interest other than race, some such evidence was also introduced in *Bush* (citing evidence that the district "has a consistently urban

character and has common media sources throughout, and that its tentacles include several major transportation lines into the city of Dallas"), but that evidence was insufficient. *Id.* at 967.[65] While the population included in CD6 may have interests and characteristics in common other than race and one could generally say that urban Hispanics in Fort Worth and Dallas share similarities, that does not make them geographically compact, and Plaintiffs offer no explanation of why certain bizarrely shaped appendages are included, while nearby areas that could presumably form communities of interest are carefully excised. There is no evidence that specific lines, such as where the district reaches out and grabs a strangely shaped portion of the City of Irving and extends upward to take portions of Farmers Branch and Carrollton yet excises portions of Dallas, respect specific communities of interest such as neighborhoods (they certainly do not respect cities). Similarly, within Tarrant County and Fort Worth, there is no evidence to explain specifically what communities of interest are contained within the various appendages, other than that they are poor, relatively uneducated, and Latino. Nor is there evidence that the areas included in CD6 from various parts of Dallas County have more of a "community of interest" with those areas of Tarrant County to which

---

[65]In addition, although CD12 in *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899 (1996) was drawn to share communities of interest (the state wanted to place predominantly rural voters in one district and predominantly urban voters in another and ensure that incumbents would remain residents of their districts), the Court declared that "[n]o one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race." *Id.* at 916.

they are joined than the areas immediately surrounding them but excluded from the district.

Thus, because of a lack of such evidence, the shape of the proposed district, and the other factors discussed above, the inescapable inference remains that the Hispanic citizen voting age population is not sufficiently compact and it is necessary to draw bizarre and convoluted lines to obtain enough population to reach the majority threshold. *See Fairley*, 584 F.3d at 669 ("Without sufficiently detailed evidence, a court is flatly unable to evaluate whether a possible redistricting scheme would establish legally adequate districts consistent with traditional districting principles such as compactness, contiguity, maintaining communities of interest, and respect for incumbency."); *see also Vera*, 861 F. Supp. at 1341 (rejecting argument that districts were sufficiently compact for *Shaw* purposes because they "include residents of similar socioeconomic background and lie fully within [one] county" because the districts were formed "in utter disregard for traditional redistricting criteria" and were "ultimately unexplainable on grounds other than the racial quotas established for those districts").

Further, CD6 is similar to the district rejected as noncompact in *Sensley v. Albritton*, 385 F.3d 591 (5th Cir. 2004). There, the district court rejected the plaintiffs' proposed 50.1% and 50.5% African-American voting age population districts because they failed to satisfy the geographical compactness requirement. Plaintiffs appealed, complaining that the court focused too much on district shape and "should have inquired more generally into whether the reconfigured district had 'take[n] into account traditional districting principles such as

maintaining communities of interest and traditional boundaries." *Id.* at 596.

The Fifth Circuit noted, "As the geographical shape of any proposed district necessarily directly relates to the geographical compactness and population dispersal of the minority community in question, it is clear that shape is a significant factor that courts can and must consider in a *Gingles* compactness inquiry." *Id.* In other words, the compactness inquiry "should not *hinge* on the shape of a district," but "the shape of a district certainly cannot be disregarded in a compactness inquiry." *Id.* (emphasis in original). The *Sensley* district was "an irregularly-drawn District 6 whose extended and distorted shape—resulting specifically from excluding non-blacks while simultaneously adding 'excess' blacks from other communities—constitutes strong evidence that the black minority populations contained therein are not 'reasonably compact.'" *Id.* at 597. Further, in order to connect African-American populations in two towns from two distinct communities ("which are separated by considerable distance (approximately 18 miles) and share few community interests"), the plaintiffs were required to ignore traditional districting principles such as maintaining communities of interest and traditional boundaries insofar as they split a town in half and disrupted existing electoral districts. For these reasons, the Fifth Circuit found that the district court's conclusion that plaintiffs failed to prove that the African-American population of Union Parish was sufficiently compact was not clearly erroneous. *Id.* at 598.[66]

---

[66] *See also Gonzalez v. Harris Cty., Tex.*, 601 F. App'x 255, 258 (5th Cir. Feb. 9, 2015) (noting that *Gingles* compactness requires

Precedent thus indicates that if a proposed district is simply too bizarrely shaped *because* the minority population is dispersed in such a way that traditional districting criteria are barely considered, if at all, in drawing the district, it will be found to be non-compact for § 2 purposes. Like the districts in *Bush v. Vera* and *Sensley*, Plaintiffs' proposed CD6 has many tentacles and appendages. It shows no regard for traditional districting principles such as respecting counties, towns, cities, or voting precincts. It spans 60 miles and connects Hispanic populations in Dallas and Fort Worth by a long narrow corridor along the highway. Although there is evidence that the persons included do share some commonalities, it appears that the Latino citizen age voters are simply too dispersed to form the majority in a compact district, and Plaintiffs have failed to satisfy the first *Gingles* precondition for the creation of a new Latino opportunity district in the DFW area through proposed CD6.[67]

2. Use of 2008-2012 ACS data for certain proposed districts

Certain Plaintiffs contend that, given the lagging nature of the ACS data and the fact that it underestimated the Hispanic and African-American CVAP in Dallas and

---

accounting for traditional districting principles such as maintaining communities of interest and traditional boundaries, and affirming district court's rejection of geographically compact hypothetical HCVAP-majority district because it did not respect traditional districting principles).

[67] Nothing in this ruling precludes Plaintiffs who have pleaded such a claim from pursuing their § 2 results claims based on the failure to draw an additional Latino opportunity district in DFW in Plan C235.

Tarrant Counties,[68] some proposed districts in DFW that were below 50% HCVAP using 2005-2009 ACS data actually exceeded the 50% threshold at the time of redistricting. Although the Court finds that the 2008-2012 ACS data, which the experts generally agree more accurately reflects the population in 2010 than the 2005-2009 ACS data used by the Legislature, is relevant to Plaintiffs' results claims against Plan C185,[69] Plaintiffs have failed to demonstrate with that data that any of those proposed districts would have exceeded 50% HCVAP in 2010 or 2011.

---

[68] As discussed in the fact findings, the Court agrees that the 2005-2009 ACS data was lagging insofar as it more accurately represented the population in 2007 than 2010 and that it underestimated the minority CVAP.

[69] Even counsel for Defendants acknowledged that, for § 2 results claims, "there's an argument that [the 2008-2012 ACS data] is a much more accurate picture of what the facts on the ground were in 2010." TrA2123. The court in *Rodriguez v. Harris County, Tex.*, 964 F. Supp. 2d 686, 732-33 (S.D. Tex. 2013), *aff'd sub nom. Gonzalez v. Harris County, Tex.*, 601 F. App'x 255 (5th Cir. Feb. 9, 2015), allowed the plaintiffs to support their § 2 claims with 2006-2010 ACS figures even though the 2005-2009 ACS data was the only publicly available data at the time the plan at issue was adopted in August 2011. The Court agrees with that court's conclusion that more recent ACS 5-year surveys can be considered in evaluating the HCVAP of proposed *Gingles* districts in § 2 results claims. In fact, the Court finds that the 2008-2012 ACS data would best reflect the CVAP data corresponding to 2010, and would be the preferable data for evaluating § 2 results claims concerning the 2011 redistricting maps. Even though this data was not available to the Legislature at the time of redistricting, a § 2 results claim determines only whether the district lines result in minority vote dilution, and is not dependent on what the Legislature knew or intended at the time of redistricting.

For example, CD34 in Veasey's Fair Texas Plan C121 was 45.6% HCVAP using 2005-2009 ACS data, but increased to only 47.4% using 2008-2012 ACS data. Joint Map Ex. J-2; D-545.6. CD35 in MALDEF's Plan C122 was 45% HCVAP using 2005-2009 ACS data, but increased to only 45.9% using 2008-2012 ACS data. Joint Map Ex. J-3; D-546.6. CD35 in Plan C166 was 45.6% HCVAP using 2005-2009 ACS data, but increased to only 47.4% using 2008-2012 ACS data.[70] Joint Map Ex. J-7; D-565.5. CD35 in Plan C193 was 44.6% using 2005-2009 ACS data, and increased to only 45.8% using 2008-2012 ACS data.[71] Joint Map Ex. J-14; D-571.6. Although the Court finds that the 2005-2009 ACS data did underestimate the HCVAP population in 2010/2011, it does not appear to have done so as drastically as Plaintiffs anticipated. Thus, even using the 2008-2012 ACS data to analyze the districts, Plaintiffs do not reach the 50% HCVAP threshold.

---

[70] In their 2011 post-trial briefing, the Rodriguez Plaintiffs urged the Court to credit Dr. Ansolabahere's testimony and rebuttal report, which sought to compensate for the 2005-2009 ACS data lag. Docket no. 424 at 9-10. Dr. Ansolabahere testified that he believed CD35 in Plan C166 exceeded 50% HCVAP at the time of redistricting. The 2008-2012 ACS data have not borne that out, however, and Plaintiffs have not offered a convincing argument for relying on Dr. Ansolabahere's testimony over the 2008-2012 ACS data.

[71] LULAC submitted Plan C195 with CD33 that expert witness George Korbel "designed" to be majority-HCVAP. Joint Map Ex. J-16. As he notes, it is a very "stressed" district and reaches only 47.5% HCVAP using 2005-2009 ACS data. Tr691. Korbel opined that the district likely exceeded 50% HCVAP using more current data, but LULAC did not provide the 2008-2012 ACS data to show whether this was true. Given that the HCVAP in other plans did not increase by more than 2%, the Court finds that CD33 in Plan C195 was likely not majority-HCVAP at the time of redistricting.

3. NAACP Plan C193 and use of post-enactment population projections

The NAACP asserts that this Court should rely on post-enactment population data to determine whether the *Gingles* numerosity condition is satisfied. As noted, the NAACP submitted Plan C193, which included CD35 that was not HCVAP-majority based on 2005-2009 ACS data (it was 44.6%) or 2008-2012 ACS data (it was 45.8 (+/-.9)%), but that Dr. Fairfax testified became HCVAP-majority sometime between 2012 and 2013. TrA805-06 (Fairfax) (testifying that the projected HCVAP was 50.48% in 2013 and 51.92% in 2014).

NAACP Plaintiffs rely on two Fifth Circuit cases to support their use of post-enactment population data. In *Westwego Citizens for Better Government v. City of Westwego*, 906 F.2d 1042 (5th Cir. 1990), the plaintiffs filed suit in 1985, challenging the at-large election of city aldermen and proposed two plans, both of which would create one district in which black residents would be a majority. Trial was initially postponed pending the Supreme Court's decision in *Gingles*, and then after a bench trial the court dismissed the case based on oral rulings. The Fifth Circuit remanded after the first appeal, directing the district court to make specific findings of fact and conclusions of law. *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989) ("*Westwego I*"). In a footnote, the Court noted that the record was "unclear" whether there would in fact be a black majority of voting age population in a single district under the plaintiffs' proposed plan, and the district court was directed to make this determination on remand. *Id.* at 1205 n.4.

On remand, the district court issued supplemental findings, including that "there was no evidence in the record to support the conclusion that blacks would constitute a majority of the voting age population in any proposed single-member district." *Westwego II*, 906 F.2d at 1043. The district court also rejected a finding of racially polarized voting and entered judgment. The plaintiffs then filed a motion asking the district court to amend its findings to take into account developments in the two years since the case was originally tried, specifically a March 1989 election that, for the first time, involved a black candidate. *Id.* The plaintiffs also included "black voter registration data and data from the 1989 election." *Id.*

On the second appeal, the Fifth Circuit held that "given the long term nature and extreme costs necessarily associated with voting rights cases, it is appropriate to take into account elections occurring subsequent to trial" to determine the presence of racially polarized voting. *Id.* at 1045 (footnote omitted). This was especially true in that case, given that no elections prior to trial involved an African-American candidate, such that the post-trial election was "highly relevant." *Id.*

Regarding the population, the Fifth Circuit faulted the district court for failing to take new evidence that the BVAP was sufficient in size, instead determining based on the old record that there was no evidence "that blacks would constitute a majority of the voting age population." *Id.* at 1046. The Court noted that the proffer "would have allegedly proved that blacks constituted a majority of the voting age population in certain hypothetical districts," and included evidence as to the number of registered black voters in the hypothetical districts, evidence that

the black candidate in the March 1989 election received 52% of the vote in those districts, and an affidavit that an agency could provide BVAP data for the districts. Id. The Fifth Circuit noted that minority voting age population data, minority voter registration data, and evidence of success by minority-preferred candidates is relevant to the first *Gingles* factor, specifically to establish potential to elect. *Id.* The Court stated, "[b]ecause of frequent difficulties of proof and in light of the fact that vote dilution cases often become 'prohibitively expensive,' the [Supreme] Court espoused a 'flexible, fact intensive test.'" *Id.* The Court cited *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 502 (5th Cir. 1987) for the proposition that "*Gingles* 'suggests flexibility in the face of sparse data.'" The Fifth Circuit remanded a second time, stating that plaintiffs would "have the opportunity to adduce the evidence referred to in their motion." *Westwego*, 906 F.2d at 1047.

On remand, plaintiffs proposed one of their original plans but used 1990 census data to show it would be majority BVAP, and also proposed a variation on that plan "drawn to account for population changes between 1980 and 1990." *Westwego Citizens for Better Gov't v. City of Westwego ("Westwego III")*, 946 F.2d 1109, 1113 (5th Cir. 1991). The district court found that the original plan was "acceptable." *Id.* On the third appeal, the plaintiffs prevailed.

Plaintiffs also cite *Valdespino v. Alamo Heights ISD*, 168 F.3d 848 (5th Cir. 1999), in which the issue was whether the defendant could present 1997 non-census data to override the plaintiffs' 1990 census data, such that the plaintiffs' hypothetical HCVAP-majority district was no longer HCVAP-majority at trial. The Court noted that

Westwego "opened the door to the use of non-census data when census data are not sufficiently probative of the voting-age proportion of a population" and that its decision in *Perez v. Pasadena Independent School District*, 165 F.3d 368 (5th Cir. 1999) affirmed a district court's decision that the plaintiffs' population projections were too unreliable to overcome 1990 census data. *Id.* at 854. The Fifth Circuit held that the district court properly placed the burden on the Plaintiffs to prove a majority of Hispanics among voting-age citizens in their demonstration district at trial, and the defendant presented sufficient evidence to prove demographic changes since the census that showed there was no majority. *Id.* at 856. Citing other cases, the district court had noted that the court was not confined to census data, and that census data could be overcome by thoroughly documented and accurate proof of changed figures.

These cases support NAACP's position that, when appropriate, parties may use non-census data, if shown reliable, to prove that the CVAP is sufficiently changed from prior census data or data used at redistricting to either prove or disprove § 2 liability. By analogy, plaintiffs could potentially use data such as projections, if shown reliable, to prove that the CVAP is sufficiently changed from the ACS data used at redistricting to prove § 2 liability. However, the Court need not decide this issue because it finds it inappropriate to consider Fairfax's projections in the 2011 plan case given the facts of this case.

In *Westwego*, the post-enactment evidence was considered to clarify an ambiguity, whereas here there is no such ambiguity—the ACS data show that the district was not majority HCVAP in 2010, and Fairfax agrees it

was not HCVAP-majority at the time of redistricting. In *Valdespino*, the lawsuit was not filed until 1995 and trial was held in 1997, many years after the 1990 census data that plaintiffs were relying on for their case, such that it was appropriate for the court to consider whether liability was established using more current demographic data.[72] Here, in contrast, Plan C185 was enacted in 2011, but a new plan was enacted in 2013. There is no ambiguity or significant lapse of time that would warrant consideration of 2012 or later projections to evaluate the 2011 plan. Reliable demographic data concerning the population in 2012/2013 may be relevant to Plaintiffs' § 2 claims against the plan enacted in 2013, Plan C235, but not Plaintiffs' claims against the 2011 plan. Accordingly, the Court finds that the NAACP Plaintiffs failed to establish that their proposed district satisfied the numerosity requirement in 2011, though they are not precluded from raising this same argument and plan in the 2013 plan trial phase with regard to Plan C235.

B. Whether Plaintiffs can satisfy Gingles for a coalition district in DFW?

A number of maps were submitted to the Legislature during redistricting that would have created coalition districts in the DFW area, but the mapdrawers refused to draw such districts because they did not feel they were required by the VRA. In fact, mapdrawers were hostile to the creation or existence of minority coalition districts

---

[72] The situation in *Johnson v. DeSoto County Board of Commissioners*, 204 F.3d 1335 (11th Cir. 2000), another case cited by the NAACP Plaintiffs, was similar. The court found it proper to consider non-census data to determine whether the 1990 census data accurately described the county population at trial in 1998.

because they viewed them as Democrat districts. *See, e.g.*, TrA277; TrA287 (Seliger) (minority districts were "without question" thought of as Democrat districts and Republican leaders thought maps with proposed districts "were just designed simply for Democratic seats"); TrA1600 (Downton) (stating that the map had to be 3-1 and that the Legislature would not vote for a district unless it was a Republican district).[73] As discussed in the Conclusions of Law, however, this Court finds that coalition districts may be required by § 2, so long as Plaintiffs satisfy *Gingles* with regard to the coalition. The Court thus turns to that inquiry.

As noted, to satisfy the first *Gingles* precondition, plaintiffs generally must proffer a demonstration district with a geographically compact minority population that exceeds 50% of the CVAP of the district. Plaintiffs have

---

[73] At the June 2 HRC hearing when Solomons laid out Plan C125, he characterized CD6 as a "coalition district" (D-601 at 10), but there is no indication that any of the mapdrawers actually believed this to be true. Rather, as with Solomons' statements about CD23, this statement was made to create an appearance that mapdrawers were drawing new minority districts or were recognizing minority growth, when in fact they were not, and they knew they were not. The Red-100 Report shows that CD6 was 11.4% BVAP and 39% HVAP, and 50.1% B+HVAP. Thus, it had a bare majority of minority VAP, but it also had an Anglo CVAP of 59.5%. D-548. Therefore, it was not a majority-minority CVAP district. It was inconsistent for Solomons to assert that CD6 was a coalition district based on VAP when he and the mapdrawers had insisted on using CVAP to determine whether a district was a required VRA district. In addition, mapdrawers knew this district would not perform for minorities, and given their adherence to a 3-1 map policy, admittedly would not have drawn it to perform for minorities because they felt that would have made it a Democrat district.

proffered a number of plans with coalition districts that exceed 50% minority CVAP when Hispanic and African-American CVAP are combined. Some demonstration plans include one additional minority coalition district compared to Plan C185, but most include two additional minority coalition districts (in addition to benchmark CD30). In addition to arguing that coalition districts are never required, Defendants attack these plans as creating non-compact districts and for lacking the required minority cohesion.

The Court finds that Plaintiffs' § 2 results claims concerning the failure to draw one additional coalition district are moot, given that Plan C235 contains such a district and no additional bail-in relief could be granted even if Plaintiffs were to prevail on this claim. With regard to the results claims based on the failure to draw two additional districts, the Court finds that Plaintiffs fail to offer sufficient evidence to satisfy the first *Gingles* requirement of compactness.

1. Plan C121

Veasey's Fair Texas Plan C121[74] includes two coalition districts spanning Dallas and Tarrant Counties, in addition to maintaining CD30 entirely within Dallas County (with a 2005-2009 ACS combined BCVAP of 45.6% and B+HCVAP over 50%). Joint Map Ex. J-2. The Quesada Plaintiffs offer this plan, asserting that CD34

---

[74] Plan C121 was offered during the 2011 legislative session and, according to then-Representative Marc Veasey, was drawn to more accurately reflect partisan balance in the state between Republicans and Democrats, in line with the partisan fairness arguments that Republicans used to justify the mid-decade redistricting in 2003. Veasey depo. (Joint Ex. J-55) at 70-72.

would be a new Hispanic district (with 45.6% HCVAP and 16.5% Black alone CVAP using 2005-2009 ACS data) and CD35 would be a new African-American opportunity district (with 35.6% Black alone CVAP and 15.2% HCVAP using 2005-2009 ACS data).[75]

The Quesada Plaintiffs state that CD34 "would be based in the traditional and growing Hispanic neighborhoods in the North Oak Cliff, East Dallas, Pleasant Grove and Grand Prairie neighborhoods in Dallas County and extend west to include growing Hispanic neighborhoods in east Arlington as well as Fort Worth's north side and south side Hispanic neighborhoods." Docket no. 409 at 15. Veasey testified that CD34 "keeps communities of interest together" and was more "coherent" compared to CD26 in Plan C185. Veasey depo. (Ex. J-55) at 67.

The Quesada Plaintiffs state that CD35 "would be based in the large and growing African-American neighborhoods in southeast, southwest, and east Fort Worth" and "would extend east through growing minority neighborhoods in Arlington and into Dallas County to include African-American neighborhoods in the southwest Dallas County cities of Cedar Hill and DeSoto."

---

[75] Using 2008-2012 ACS data, these districts remained majority B+HCVAP and although both Black alone and HCVAP increased in both districts, neither district exceeded 50% for a single minority group. D-545.6. The Quesada Plaintiffs also offer Plan C192, which would "retain District 30 as a Dallas-based African-American opportunity district" and create CD34 (a new Hispanic opportunity district) and CD35 (a new African-American opportunity district). Docket no. 409 at 17. These districts are identical to those in Plan C121 and thus are not separately analyzed. The Quesada Plaintiffs also offer Plan C202, which is discussed below.

Docket no. 409 at 15-16. Meanwhile, they say, existing African-American opportunity district CD30 would "retain its core South Oak Cliff and South Dallas neighborhoods but would extend north to include the growing African-American neighborhoods along the east and north Interstate Highway 635 corridors." Docket no. 409 at 15.

Veasey testified that Plan C121 was drawn to comply with the VRA in terms of using race and so that African-American and Latino voters would have additional opportunities to elect. Veasey depo. (Joint Ex. J-55) at 80-81. When asked if race was considered in drawing the DFW districts, Veasey stated that he followed the Constitution and the VRA with regard to race and further stated, "I would say that the communities of interest, and those communities of interest happen to be communities that were mainly Hispanic, were taken into consideration when drawing this map." *Id.* at 80-81, 83. When asked what the other considerations were, he stated "that would be the biggest one" but also whether they would be able to work together and whether people in the district would have their voices heard. *Id.* at 83-84.

Ed Martin, one of the primary mapdrawers of Plan C121, testified that Congresswoman Johnson approved her district (CD30) in Plan C121 and thought it would be effective, that CD34 would be an effective Latino district, and that CD35 would be an effective African-American district similar to CD9 in Houston. Martin depo. (Joint Ex. J-48) at 120-21. He testified that CD34 was "drawn to provide electoral opportunity for 1.4 million Latino voters in the region." *Id.* at 122.

Dr. Lichtman analyzed Plan C121, and he testified that CD34 and CD35 in DFW would provide effective

opportunity for the minorities in those districts (the minority-preferred candidate prevailed in all five reconstituted statewide elections studied, and usually by a wide margin). Tr1240-41; Joint Expert Ex. E-3 at 20-22, Table 12. He concluded that CD34 would be an effective voting age single race Latino district (66.2% HVAP) and CD35 an effective voting age majority-minority district (59.5% B+HVAP). Joint Expert Ex. E-3 at 20, Table 11. Dr. Lichtman testified that he believed these districts were required by the VRA. Tr1259.

From a visual perspective, all three districts look somewhat bizarre, especially CD34. Although the Quesada Plaintiffs assert that proposed CD34 and CD35 are "reasonably compact," they fail to support this assertion. Docket no. 409 at 17. Defendants' compactness expert Todd Giberson noted that CD34 was similar to CD6 in Plan C190 and that it was not very compact. Joint Expert Ex. E-18 at 5-6. CD34 has an area rubber band score of .331 and a perimeter-to-area score of .043, both of which reflect low compactness. Joint Map Ex. J-2. Giberson did acknowledge that Texans view Dallas and Fort Worth as a unit—the "metroplex." Giberson depo. (Joint Ex. J-42) at 69. Although he testified that a district could connect two separate and distinct minority populations and still be compact (such as a referenced "earmuff" district in Illinois), he thought that CD34 (like CD6 in Plan C190) went to greater lengths to connect small pockets in both Dallas and Fort Worth and that the boundary was more convoluted than other districts he believed to be compact. *Id.* at 68-70.

Plaintiffs have not sufficiently proven that the proposed districts are compact for § 2 purposes insofar as

they have not shown that the districts (and the minority populations therein) are compact taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries. *See Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 738 (S.D. Tex. 2013) (noting that plaintiffs' demonstration maps satisfied the numerosity requirement but failed to present evidence explaining or permitting the court to understand to what extent the maps comported with traditional districting principles such that plaintiffs failed to establish the first *Gingles* precondition), *aff'd sub nom Gonzalez v. Harris Cty., Tex.*, 601 F. App'x 255 (5th Cir. Feb. 9, 2015).[76] Even if CD35 could be considered

---

[76] In *Gonzalez*, the Fifth Circuit indicated that the Supreme Court's directive in *Easley v. Cromartie* that "the party attacking the . . . boundaries [drawn by the political subdivision] must show at the least that [it] could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" would be part of the plaintiff's burden under the *Gingles* first precondition in a § 2 results case. *Gonzalez*, 601 F. App'x at 259 (citing *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)). However, *Easley v. Cromartie* is not a § 2 case—in that case, the plaintiffs asserted a *Shaw*-type racial gerrymandering claim against North Carolina's CD12, with plaintiffs arguing that the district was drawn predominantly on the basis of race and defendants arguing that the district was drawn on the basis of politics. The Supreme Court held that, in trying to prove that the district was drawn on the basis of race rather than the basis of politics, when the voting population is one in which race and political affiliation are highly correlated, plaintiffs must show that the legislature could have achieved its legitimate political goals in alternative ways comparably consistent with traditional redistricting principles and that would have brought about significantly greater racial balance. *See Alabama LBC v. Alabama*, 135 S. Ct. 1257, 1267 (2015) (noting that *Easley v. Cromartie* explains the plaintiff's burden in racial gerrymandering

compact, CD34 suffers from the same problems and lack of evidence as the Task Force's proposed CD6 in Plan C190. Conclusory assertions that the districts join "communities of interest" are insufficient, especially when the district is convoluted in shape and does not appear to respect traditional boundaries and communities of interest such as cities and voting precincts. Thus, Quesada Plaintiffs' proposal C121 fails to demonstrate that two additional compact minority districts could be drawn in DFW taking into account traditional redistricting principles and communities of interest.

2. Plan C163 & Plan C164

MALC offered demonstration plans C163 and C164 as creating two additional opportunity districts in DFW. Tr93-94 (Martinez-Fischer). Dr. Arrington found that Plan C163 overall "satisfied traditional redistricting principles" at least as well as the enacted plan. TrA410-11. However, this plan still split 447 precincts (Plan C185 split 518). US-352 at 54. He found that the overall compactness score (as measured by the mean Polsby-Popper score) was roughly similar to the enacted plan. TrA433; US-352 at 54. He opined that Plan C163 did "a

---

cases in which the State argues that politics, not race, was its predominant motive). This Court fails to see how this requirement would apply to the plaintiffs' burden under § 2 to demonstrate that the minority population is sufficiently geographically compact to constitute the majority in a district, taking into account traditional redistricting principles. In a § 2 results claim, there is no question of discerning political from racial motive in the drawing of a demonstration district—as the Fifth Circuit recognized in *Clark v. Calhoun County* (and as discussed *supra* n.59), demonstration districts are necessarily drawn using racial criteria.

better job . . . in respecting the integrity of Dallas and Tarrant County." US-352 (Arrington Decl.) at 54.

CD5 in Plan C163 and Plan C164 is a convoluted butterfly shape that is almost entirely within Dallas County except for a small protrusion into Tarrant County that picks up 148 persons who are 86.5% Hispanic and African-American. Joint Map Ex. J-5 & J-6. It splits Grand Prairie, Irving, Farmers Branch, Carrollton, Mesquite, and Balch Springs. Giberson noted that "the convoluted boundaries stand out, as does the wispy, narrowly connected protrusion to the east." Joint Expert Ex. E-18 at 6. At his deposition, Giberson stated that CD5 was "borderline" to him. Giberson depo. (Joint Ex. J-42) at 77. He felt that the "wispiness" and "the connectivity of some of the area through such a narrow point" (specifically one large mass and two smaller masses "connected via some very small point") were problems. *Id.* at 78; *see also id.* at 79 ("I didn't like it on compactness because of the appendages that were there."). Again, this district does not appear to respect traditional boundaries and communities of interest, and Plaintiffs have failed to offer sufficient evidence to show that the population is sufficiently geographically compact taking into account such principles. The evidence concerning proposed CD12 in Plan 164 (which is almost identical to CD35 in Plan C163), which spans Dallas and Tarrant Counties, and CD30, which includes parts of Dallas and splits Duncanville, Balch Springs, Mesquite, and Garland, is similarly deficient.

3. Plan C193

The NAACP and the African-American Congressperson Plaintiffs offer Plan C193,[77] which the NAACP contends maintains "the effectiveness and integrity" of CD30 (as an African-American district) while adding a proposed new coalition African-American opportunity district (CD34) and a new coalition Latino opportunity district (CD35). Tr2077-78 (Ms. Riggs); *see also* docket no. 406 at 20-29; Joint Map Ex. J-14. CD30 has 49.6% BCVAP and 14.1% HCVAP using 2005-2009 ACS data. CD30 is 51.9% BCVAP using 2008-2012 ACS data. D-571.6. Proposed CD34 is majority-minority CVAP, but the B+HCVAP (32.4% + 15.8%) is less than 50% using 2005-2009 ACS data.[78] The H+BCVAP of CD34 is 52.9% using 2008-2012 ACS data. D-571.6. Proposed CD35 is over 50% B+HCVAP using either 2005-2009 or 2008-2012 ACS data.

Dr. Murray opined that Plan C193 "corrects the glaring failures in 2003 and 2011 to recognize the tremendous minority population growth in the area" and would create three effective minority opportunity districts there. Joint Expert Ex. E-4 at 36-37; Tr1035 (noting that CD34 and CD35 would be effective districts for minority voters). He stated that C193 creates a "more compact" CD30, does not undermine its long-term

---

[77] The three DFW districts in Plan C193 are the same as in Plan C201 (also known as the "SCSJ July 5 Plan"). Plan C193 is a 7-district plan, and Plan C201 is a 14-district plan. They also resemble the districts in Plan C121, proposed by the Quesada Plaintiffs.

[78] In 2011, this district was proposed as an African-American, Latino, and Asian-American coalition district that would perform as an African-American opportunity district. Docket no. 406 at 27-28.

viability as an African-American district, and restores economic engines and communities of interest. Joint Expert Ex. E-4 at 37. He fails to explain how the NAACP's CD30 is more compact than the CD30 in Plan C185. Murray also opined that "[t]he heavily black and Hispanic neighborhoods in the Dallas/Fort Worth area were fairly close together in 2000. Since then, the combination of out-migration of Anglos and the rapid growth of mixed neighborhoods . . . has consolidated a broad swath of territory in over half of Dallas County and a third of Tarrant County that provides ample population for three compact minority opportunity districts" such that it is now "easier . . . to draw three minority opportunity districts in Dallas and Tarrant Counties in 2011 than was the case in [Houston] in 2003 when three such districts were produced." Murray report (Joint Expert Ex. E-4) at 32-33. However, Murray fails to offer any support for his assertions that these districts are compact, and visually, they are bizarrely shaped and non-compact.

The NAACP's expert Anthony Fairfax prepared a 2011 report (docket no. 267[79]) evaluating these districts (in the SCSJ July 5 Plan). Fairfax concluded that "the districts included in the Congressional SCSJ July 5 plan [including districts 30, 34, and 35] met traditional redistricting criteria and could be adopted in whole or in part by the state legislature." Docket no. 267-2 at 10; Docket no. 267-1 at 7; Tr834, Tr838-39, TrA793. The traditional redistricting criteria he evaluated were

---

[79] Fairfax's report was submitted at trial as Joint Expert Ex. E-13. However, a corrected report and a supplemental report were filed on August 30, 2011 at docket no. 267.

demographic information (this appears limited to the district's VAP status), equal population, contiguity, county splits, and compactness.

Fairfax found that all districts in the plan were within the minimum and maximum compactness measurements (using Reock compactness measurements) of the enacted Plan C185. TrA794. Using the Schwartzberg and Polsby-Popper measurements, all districts were within the range except for proposed CD35. Fairfax depo. (Joint Ex. J-45) at 25-26; docket no. 267-1 at 4. Fairfax noted that it was not outside the compactness range of C185 by much, and he felt that CD35 was still within the acceptable range and would not raise *Shaw* problems in terms of compactness. Fairfax depo. (Joint Ex. J-45) at 38, 37; Tr795. Fairfax stated that CD35 was more compact than the district invalidated in *Shaw v. Reno* and was "not that much different" from other districts he had seen "around the country." *Id.* at 29. However, Fairfax did not know why the district was drawn in its particular configuration. *Id.* at 29-30. And he also noted that there may be other factors that determine whether a district violates *Shaw v. Reno* besides compactness scores. *Id.* at 37-38. Nevertheless, Fairfax provided his expert opinion at the August trial that CD34 and CD35 in Plan C193 are "compact enough to avoid *Shaw* problems." TrA795.

Congresswoman Johnson testified that CD34 and CD35would be effective districts in terms of the voters therein voting cohesively and electing a candidate of choice. Tr1291-92. When asked about C193 in terms of "the handling of the African American and Latino growth in the Dallas and Tarrant County areas," Congresswoman Johnson stated, "they get representation because they're placed together. They have common desires, common

economics. And the important issues to them are the same. And a map like this, they get representation so they can elect a person of their choice." TrA691. She testified that a "major purpose" behind drawing the three districts (CD30, CD34, and CD35) was "to give an opportunity for those concentrated minorities to elect a candidate of their choice." Tr1304. She stated that there are communities of interest beyond race that were part of the creation of CD34 and CD35 (though she stated it was primarily race). Tr1311. On follow up, she agreed that the districts contained communities of interest that have concerns about education and employment, criminal justice and "issues of that nature." Tr1312. She also testified that there were non-racial components to the district such as public television, public radio areas, and there was a major community coalition there with people with "very like desires." *Id.*

Franklin Moss, a resident of Tarrant County, testified that proposed CD34 "pulls together most of the . . . black areas on the Fort Worth Side of it" and "also takes under consideration, we call kind of the I-20 corridor of cities that are – that are right now majority African American. And that's Cedar Hill, Duncanville, DeSoto, Lancaster. So it pulls those areas together." TrA1185. He stated that those areas share "a lot of commonalities," but the only explanation of that statement was that "it sits on . . . that I-20 corridor, which even runs into Fort Worth. So it gives us an opportunity to pretty much be assured that we would elect a black candidate from that particular area." *Id.* He testified that African-American and Latino voters in Tarrant County share common concerns and interests, and that they shared interests concerning economic development, housing (specifically rebuilding

communities), health, and employment issues. TrA1180. Congresswoman Johnson testified that new CD34 took a large concentration of African-American population from CD30 but because of the growth in certain areas of proposed CD30, CD30 would be maintained as an African-American coalition district. Tr1293-94. She acknowledged the CD34 was minority Anglo in terms of voting age population, and stated that was significant because the African Americans and Latinos have mutual issues and live in a concentrated area together. Tr1294. She also felt the Asian voters would act in coalition with African-American and Latino voters. *Id.* The NAACP asserts that CD34 "is [a] naturally-occurring minority opportunity district that captures high growth communities of interest in the DFW region" and that "CD34 encompasses a community of interest—the growing African American population along the I-20 corridor." Docket no. 1280 at 39; docket no. 1281 at 35 (proposed FF 190); docket no. 1232 at 13; TrA1980 (Riggs closing argument) ("We heard testimony from Franklin Moss about the community of interest that exists along the I-20 corridor in the southern parts of Tarrant County and Dallas County, and this is where that district [CD34] is drawn to encompass that naturally occurring population growth."). The NAACP also asserts that "CD34 is a compact district, well within the norms of the compactness of the enacted districts." Docket no. 1281 at 34 (proposed FF 189). It has an area rubber band score of .600 and a perimeter to area score of .089. Joint Map Ex. J-14.

The NAACP states that "CD35 is a reasonably compact district that encompasses a compact minority population. It is only in two counties, and all within one urban region." Docket no. 1232 at 14; docket no. 1280 at

42; docket no. 1281 at 35 (proposed FF 192). Congresswoman Johnson testified that it would be appropriate to consider African-Americans and Latinos as a group for the creation of CD35 and it would be a good coalition "because we all vote together now." Tr1293. Defendants' expert Giberson stated that CD35 has one of the worst compactness scores of all DFW districts in the Plaintiffs' proposed interim plans. Giberson Decl. docket no. 468 at ¶ 11. Its area rubber band score is .331 and its perimeter to area score is .037, again very low. Joint Map Ex. J-14.

The NAACP asserts that African-American and Latino voters in Dallas and Tarrant Counties face many of the same hurdles in day-to-day life, including lack of access to health care, lack of fair educational opportunities, and persistent economic disparities. Docket no. 1280 at 41 (citing TrJ1134-35 (Magdaleno)). The NAACP also asserts that schools in Dallas County are still highly segregated and that Anglo officials are not responsive to minority needs. *Id.* (citing TrJ572 (Wallace) and TrA1184-86 (Moss)). Dr. Murray also opined that CD34 would be an effective district for African-American voters and CD35 would be an effective opportunity district for Latino voters. Tr1035-36.

Based on the districts' CVAP and the testimony of its experts, the NAACP asserts that it has demonstrated that proposed CD34 and CD35 comply with the first prong of *Gingles* and are legal and fair districts. Docket no. 406 at 21-29. However, the Court disagrees. Once again, Plaintiffs demonstrate that these districts meet the CVAP threshold and could elect minority candidates of choice, and even offer some evidence that the communities included within the districts contain some

similarities, but they have failed to proffer sufficient evidence to establish that the minority populations contained therein are compact. Dr. Fairfax's analysis is superficial and fails to adequately account for the fact that the districts do not appear to respect traditional boundaries. Although he looked at counties and noted the districts each only include one or two counties, he did not address cities, voting precincts, neighborhoods, or other geographical boundaries.

CD34 and CD35 both span Dallas and Tarrant Counties. CD35 extends a long tentacle into CD30, and CD30 reaches around with a long arm and hook at the top to grab minority population. CD35, which is the most visually bizarre, splits numerous small cities and appears to have little integrity in terms of traditional redistricting principles. The NAACP's proof suffers from the same deficiencies as CD6 in the Task Force Plan C190. Accordingly, the Court finds again that Plaintiffs have failed to demonstrate that two additional compact minority districts could have been drawn in DFW.

4. Plan C196

The LULAC Plaintiffs offer Plan C196, which they assert remedies the fracturing of minority communities in Dallas and Tarrant Counties and maintains CD30. Joint Map Ex. J-17. The LULAC Plaintiffs state that the minority areas that are placed in CD12, CD26, and CD33 in Plan C185 are adjacent to each other and together have sufficient population to create a congressional district, which is proposed CD34 in Tarrant County (which has a minority population of 73.8%). Docket no. 417 at 11. CD34 is 22.1% HCVAP and 29.4% Black alone CVAP. In Dallas County, the LULAC Plaintiffs propose that combining

the adjoining minority populations of CD5, CD6, CD24[80], and CD32 from Plan C185 with "a slight modification of adjoining District 30 . . . results in a new minority district that is similar to that in plan C196" and is over 80% minority population, while maintaining CD30 over 80% minority population. *Id.* at 12. CD30 (renamed CD32) is 49.7% Black alone CVAP (and 50.1% combined BCVAP) and CD33 is 39.5% HCVAP and 20.1% Black alone CVAP.

The districts in Plan C196 are not at ideal population. Further, while these districts are contained entirely within their respective counties, they again are not obviously compact, and no evidence has been presented showing that they respect communities of interest or otherwise take into account traditional redistricting principles. Thus, this map fails to demonstrate that two additional compact minority districts could have been drawn in DFW.

5. Plan C202

The Quesada Plaintiffs also offer demonstration Plan C202, which they assert draws CD34 and CD35 "more compactly" than the proposed districts in Plan C121/C192, "while maintaining them as minority opportunity districts, effective for Hispanic and African-American voters, respectively." Docket no. 409 at 17; Quesada-70. Quesada Plaintiffs state that CD34 "is an effective Hispanic opportunity district in the Dallas Fort Worth region" and is more compact than districts 2, 5, 9, 12, 15, 18, 20, 22, 28, 29, 32, 33, and 35 in the enacted plan. *Id.* at 17-18. They further assert that CD35 "is an effective

---

[80] The brief states CD26, but that does not extend into Dallas County, so the Court presumes Plaintiffs meant CD24.

African-American opportunity district" and is more compact than districts 2, 5, 9, 12, 15, 18, 22, 28, 29, 32, 33, and 35 in Plan C185. *Id.*

Quesada Plaintiffs contend that these districts are "very compact." Docket no. 409 at 17. They are certainly an improvement visually over some of Plaintiffs' proposed districts, but they are still not obviously compact. And again, there is a lack of evidence in the record demonstrating how these districts comply with traditional redistricting principles or respect communities of interest. Thus, this map fails to demonstrate that two additional compact minority districts could have been drawn in DFW.

6. Plan C206 & Plan C214

Plan C206 is LULAC's DFW three-district proposal. The districts are similar to those in LULAC's Plan C196 and statewide Plan C214. In both maps, the districts are not at exactly equal population. More importantly, again there is a lack of record evidence concerning anything other than population statistics.

7. Plan C261 & Plan C262

LULAC's demonstration Plans C261 and C262 contain CD33, a coalition district located entirely within Tarrant County and CD6, a non-compact looking district in Dallas, Denton, and Tarrant Counties, in addition to CD30.[81] The compactness scores for CD33 are .600 area

---

[81] Proposed CD33 in Plan C262 is somewhat similar to proposed CD35 in Plan C154 introduced during the session by Representatives Turner and Y. Davis and proposed CD34 in LULAC's Plan C196. Korbel testified that Plan C262 is similar to Plan C196. TrA1211 (Korbel); Joint Map Ex. J-17 (Plan C196).

rubber band and .125 perimeter to area. Red-315 Report. CD33 in Plan C262 is 28.7% combined BCVAP and 20% HCVAP, resulting in a combined 48.7% B+HCVAP using 2005-2009 ACS data. Using 2008-2012 ACS data, however, it is 51.7% B+HCVAP (22.1% HCVAP, 29.6% Black-alone CVAP). MALC-173 (docket no. 1259). Korbel noted that Plan C185 splits up the minority population in Tarrant County, but if the minority population that had been in the Plan C100 CD26 southern extension and the minority population included in the Plan C185 CD26 "lightning bolt" was connected with areas in eastern Tarrant County, which is heavily minority, "you have almost a perfect district, and a district that's overwhelmingly black and Hispanic, primarily black." TrA1223. He described this is a "logical district." *Id.*

Plan C262 also contains a proposed coalition district (CD6) mostly within Dallas County (though also extending into Tarrant County and partly into Denton County) that is 57.5% B+HCVAP using 2005-2009 ACS data. Korbel further testified that if he were starting over drawing districts in DFW, he "would take 30, shift it over, pick up five here and draw the second district right next to it" but instead the State had divided Dallas County into five districts, packing CD30, and cracking minorities in CD5 and CD6. Tr1224. Korbel also testified that the DFW districts in Plan C262 "the minority-preferred candidate appears to win virtually all the time." Tr1244

Once again, despite reaching the numerical threshold, the record fails to demonstrate how these districts respect traditional redistricting principles or communities of interest, and thus Plaintiffs fail to satisfy the first *Gingles* precondition for these districts.

8. Summary

Plaintiffs fail to proffer a demonstration plan accompanied by sufficient evidence to demonstrate that additional compact minority districts could be drawn taking into account traditional redistricting principles and communities of interest. Any plan not specifically discussed herein suffers from this same lack of evidence. However, Plaintiffs are not precluded from raising § 2 results claims with regard to Plan C235 during the trial on that plan.

C. Whether Plaintiffs have established a Shaw-type racial gerrymandering claim?

The Task Force asserts a *Shaw*-type Equal Protection racial gerrymandering claim with regard to specific districts in DFW. *See* docket no. 891 ¶ 53 (Task Force Fourth Amended Complaint) (Plan 185 uses race as a predominant factor to allocate Latino voters into and out of districts across DFW); docket no. 1308 at 2 (brief regarding *Alabama LBC*). Specifically, the Task Force asserts a *Shaw*-type racial gerrymandering claim against CD26 in Tarrant County and CD6 in Dallas County. Docket no. 1282 at 67 ("The State also assigned Latino voters in the Dallas Ft. Worth area into and out of CDs 6 and 26 on the basis of their race."); Docket no. 1274 at 278 (proposed FF 43) ("C185 also assigns Latino voters to districts on the basis of race in CD23, CD26 and CD6 in violation of the rule against race-based redistricting in *Shaw v. Reno*, 509 U.S. 630 (1993)."); TrA1963-64 (closing argument). Defendants contend that the Task Force has failed to demonstrate standing as to CD26, though they previously conceded standing as to CD6 because individual Plaintiff Renato de los Santos resided in CD6.

Certain other Plaintiffs also contend that they are bringing *Shaw*-type claims in DFW, but Defendants argue that those Plaintiffs have not alleged such claims.

1. Standing

It is well settled that a plaintiff must reside in the specific district subject to a *Shaw*-type racial gerrymandering claim in order to have standing. *Baker v. Carr*, 369 U.S. 186 (1962); *United States v. Hays*, 515 U.S. 737 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996). Early in this litigation, Defendants moved for dismissal of the Task Force's claims based on lack of standing, arguing that the Task Force individual Plaintiffs had failed to show they lived in congressional districts other than 6, 12, 23, and 27 and that its "organizational members cannot suffer vote dilution or racial discrimination." Docket no. 209 at 14. The Task Force responded that it included "Latino organizations committed to securing fair redistricting plans for Texas," including Hispanics Organized for Political Education (HOPE), the Mexican American Bar Association of Texas (MABA), the National Organization for Mexican American Rights (NOMAR), Southwest Voter Registration Education Project, the William C. Velasquez Institute, and Southwest Workers' Union. Docket no. 234 at 3. The Task Force argued that it had "standing to bring claims, in a representative capacity, on behalf of the individual members of its constituent organizations," that these individual members have standing to sue in their own right, and that the members of these organizations live throughout the State. *Id.* at 5, 7 (also citing responses to interrogatories stating that

Texas HOPE has more than 7,000 individual members living throughout Texas).

This Court denied Defendants' motion. It stated the general test for associational standing, including that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Docket no. 285 at 18-19. We held that "[t]he State asks for more factual specificity than is required at this stage of the litigation," though we recognized that more specificity might be required at the summary-judgment stage. *Id.* at 19; *see Ass'n of Comm. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 357 (5th Cir. 1999) ("When the defendant moves for summary judgment because of lack of standing, . . . the plaintiff must submit affidavits and comparable evidence that indicate that a genuine issue of fact exists on the standing issue.").[82]

---

[82] This Court's order did not expressly address Defendants' argument that the Task Force's member organizations did not suffer any harm sufficient to confer standing and that the Task Force could not base its standing on the standing of individual members of those member organizations. The Court holds that the Task Force has associational standing based on the standing of the individual members of its constituent organizations such as HOPE and NOMAR. *See Action Alliance for Senior Citizens of Greater Philadelphia v. Shapp*, 400 F. Supp. 1208, 1214 (E.D. Pa. 1975) (rejecting defendants' argument that Action Alliance lacked standing because its members were organizations rather than people since "defendants do not seriously dispute that there exists at the grass roots membership tier a substantial number of people" with standing); *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp.

Although the State has filed motions since that time, including a motion to dismiss based on mootness (docket no. 995) and a motion for summary judgment (docket no. 996), it did not raise the issue of standing in those motions. And although this Court also has an independent obligation to confirm its jurisdiction, this Court also did not raise the issue again or require Plaintiffs to put forth more particularized proof.

After the 2014 trial in this case, the Supreme Court issued its decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). Therein, the Court reiterated that *Shaw*-type claims are asserted with regard to specific districts and that an association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right. The Court found that the evidence in the record supported the inference that the organization at issue had members in all of the State's majority-minority districts because "it seems highly likely that a 'statewide' organization with members in 'almost every county,' the purpose of which is to help 'blacks and other minorities and poor people,' will have members in each majority-minority district." *Id.* at 1269. The Court further found that nothing in the record

---

689, 693 (E.D. Va.), *modified on other grounds sub nom. Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973), *vacated on other grounds*, 420 U.S. 136 (1975) ("The fact that the groups representing the individuals injured rather than the individuals themselves are the actual members of Campaign Clean Water is unimportant, since it is the interests of the individual persons that plaintiff ultimately represents."); *see also Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 326 (D. Mass. 2013) (finding standing for umbrella organization of coalition of Ugandan organizations whose individual members had suffered harm).

would lead the Conference to reasonably believe that it needed to provide additional information such as a specific membership list, and there was no reason to believe it could not do so. *Id.* at 1269-70. Thus, as part of the remand, the district court was instructed to "reconsider the Conference's standing by permitting the Conference to file its list of members and permitting the State to respond, as appropriate." *Id.* at 1270. In light of the Supreme Court's decision, the Court directed the parties "to file briefs specifically identifying the districts for which they are asserting *Shaw*/racial gerrymandering claims and discuss how the Supreme Court's recent opinion . . . affects those claims," including whether additional factual development was required. Docket no. 1301.

In response, the LULAC, NAACP, and Rodriguez Plaintiffs disavowed bringing any *Shaw*-type claims in DFW.[83] Docket no. 1302. DOJ also disavowed any *Shaw*-

---

[83] The Rodriguez Plaintiffs did plead Equal Protection Claims in their live Complaint (docket no. 896) that could be read to state a claim under both an intentional vote dilution and a *Shaw*-type theory. In paragraph 18, they allege that Plan C185 "fails to satisfy the requirements of the equal protection component of Section 1 of the Fourteenth Amendment" in at least the following particulars: (1) "Plan C185 purposefully fragments Hispanic and African- Americans in all regions of the state, dispersing them among numerous districts without regard to traditional and neutral redistricting principles, to reduce and lessen their electoral opportunities in congressional elections significantly below the level of opportunities that would be available to Hispanics were traditional and neutral redistricting principles followed. . . . (b) "Plan C185 purposefully fragments a politically cohesive coalition of African-American and Hispanic voters in the Dallas-Fort Worth Metroplex, in disregard of traditional and neutral redistricting principles, to reduce and lessen the electoral

type claims. Docket no. 1304. However, other Plaintiffs assert that they are bringing "racial gerrymandering" claims, though the State disputes that any party other than the Task Force has specifically pleaded *Shaw*-type racial gerrymandering claims. Instead, the State contends, other parties have asserted only intentional discrimination (vote dilution) racial gerrymandering claims. Docket no. 1310; *see Miller*, 515 U.S. at 910 (noting that a *Shaw*-type claim is "analytically distinct" from a vote dilution claim because a vote dilution claim "alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race, while the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts" regardless of motive).

Quesada Plaintiffs state that the "evidence developed in this case (at the 2011 and 2014 trials) show[s] that the following districts are unconstitutional racial gerrymanders: Districts 6, 12, 23, 26, 27, 30, and 33."

---

opportunities of minority voters in the area in congressional election[s] and to give undue advantage to Anglo voters." Rodriguez Plaintiffs Josie Martinez and Nina Joe Baker are Hispanic registered voters who reside in CD26 in Plan C185. Pretrial Stip. 38, 39; Second Am. Compl. ¶ 2. However, their Advisory indicates that they are asserting only vote dilution claims in DFW, though their claim involving the dismantling of CD25 also contained elements of a racial gerrymander because "the predominance of race in the way it was accomplished also would invalidate it . . . as a racial gerrymander." Docket no. 1302 at 3 & n.1. The Court has addressed this claim above in relation to CD35.

Docket no. 1305 at 3.[84] [T]heir live Complaint (docket no. 899) asserts that they reside in proposed districts 6, 9, 12, 18, 20, 24, 29, 30, 33, and thus, it appears that they could have standing to assert their *Shaw* claims with regard to districts 6, 12, 30, and 33 in DFW.

The Quesada Plaintiffs previously asserted a packing claim related to CD30, and they phrased this claim in terms of both intentional vote dilution and a *Shaw* claim. Docket no. 409 at 9, 29 ("These actions by State officials were undertaken with an intent to pack minority voters and to allow racial or language minority group membership to be the predominant factor in the drawing of the Districts.").[85] Although Quesada Plaintiffs clearly

---

[84] In 2011, Quesada Plaintiffs argued in their post-trial brief that "Plan C185 violates *Shaw v. Reno* and Its Progeny" and stated that "[e]xamples of congressional districts where race played the predominant role in creating the district include District 6, 9, 12, 18, 20, 25, 29, 30, and 33, among others." Docket no. 409 at 44, 29; *see also id.* at 45 (referencing districts 6, 12, and 26 in DFW as examples). They asserted that bizarre shape, in conjunction with certain racial and population-density data, may be "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." Docket no. 409 at 45 (quoting *Miller v. Johnson*, 515 U.S. 900, 913 (1995)). They also asserted that if one overlays the district boundaries onto a map shaded for Hispanic and African-American population concentrations, "it is clear that race drove the process in creating these districts and that racial considerations subordinated traditional redistricting principles such as compactness, protecting communities of interest, and respecting political subdivision lines." Docket no. 409 at 46 (noting the CD26 lightning bolt picking up Hispanic communities).

[85] Quesada Plaintiffs Jane Hamilton and Kathleen Maria Shaw are African-American voters who would reside in CD30 in Plan C185. Docket no. 302.

asserted *Shaw*-type claims during the 2011 phase of litigation, Defendants contend that they no longer assert such claims because the racial gerrymandering language was omitted from their live complaint (docket no. 899), their (Joint) Post- Trial Brief (docket no. 1277) does not cite *Shaw* or *Miller* or specifically argue a racial gerrymandering claim, and their (Joint) Post-Trial Reply Brief (docket no. 1292) appears to "disavow" any *Shaw*-type claims. Docket no. 1310 at 4-5.

In their brief concerning *Alabama LBC*, Quesada Plaintiffs correctly assert that a substantial amount of the evidence relevant to the intentional discrimination claims "also supports a finding of unconstitutional racial gerrymandering because it demonstrates that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" Docket no. 1305 at 6 (quoting *Miller*, 515 U.S. at 916). Quesada Plaintiff's live Complaint, however, does not assert an obvious *Shaw*-type claim. The Fourteenth Amendment claims are couched only in terms of intentional discrimination and vote dilution. Therefore, the Court finds that Quesada Plaintiffs' live Complaint does not sufficiently state a *Shaw*-type racial gerrymandering claim.

MALC's Advisory asserts that it maintains *Shaw*-type racially gerrymandering claims against "the districts in Tarrant and Dallas Counties (primarily CDs 12 and 26)." Docket no. 1309 at 7 (citing MALC's Third Amended Complaint (docket no. 897) ¶¶ 56-65). MALC then contends that this Court "has already decided that MALC has standing," citing this Court's prior order at docket no. 285. Docket no. 1309 at 8. MALC notes that it previously disclosed its membership list (*see* docket no. 258). This list

demonstrates that it has members who reside in CD26 (Lon Burnam) and CD30 (Rafael Anchia and Roberto Alonzo), but not other DFW-area districts. MALC has provided no other information demonstrating that any of its members reside in CD12, and does not ask to supplement the record. As to a *Shaw*-type claim involving CD26 and CD30, MALC's live complaint does not clearly and distinctly allege such a claim. It alleges, "Latino and African American voters in Dallas and Tarrant Counties have been splintered and fragmented in both 2011 and 2013 to diminish their ability to effectively participate in the political process," but these allegations appear to support only their intentional vote dilution claim. Docket no. 897 at ¶ 73. The Court thus finds that MALC did not sufficiently state a *Shaw*-type racial gerrymandering claim to put Defendants on notice of such a claim.

The African-American Congresspersons state that they are asserting a racial gerrymandering claim regarding CD30 based on packing, since CD30 had its minority population increased even though it was already a safe functioning minority opportunity district. Docket no. 1307. However, this claim is phrased in terms of intentional vote dilution and racial discrimination. In addition, the record is clear that Congresswoman Johnson does not in fact reside in CD30 in Plan C185, nor do the other African-American Congresspersons. Thus, they lack standing to assert a *Shaw*-type claim as to CD30.

Thus, the only party that has clearly pleaded a *Shaw*-type racial gerrymandering claim with regard to the DFW districts in their live Complaint is the Latino Redistricting Task Force. As noted, Defendants previously conceded that the Task Force Plaintiffs have standing to assert this claim for CD6, given that individual

Plaintiff Renato De Los Santos lived in CD6 in Plan C185. However, Defendants argue that the Task Force Plaintiffs lack standing as to the other DFW districts (specifically CD26) because they have not put forth evidence that an individual with standing resides in one of the challenged districts.

The Task Force was formed during the 2011 legislative session and includes both organizational and individual members. The Task Force states that it has associational standing because it is composed of organizations with members who reside throughout Texas. It notes that the Supreme Court recognized that this fact makes it highly likely that it will have members in each district being challenged, and nothing in the record undermines the conclusion that the Task Force has standing through its members. The Task Force now seeks leave to file exhibits under seal that include addresses of named plaintiffs as well as members of the various organizations that are part of the Task Force. Docket no. 1314. The Task Force also notes that Renato De Los Santos no longer resides in CD6.

Defendants oppose the motion, arguing that the Task Force does not explain why it could not have introduced evidence of standing before or during trial, and that allowing the Task Force to supplement the record by filing out-of-court declarations from undisclosed witnesses would prejudice the State severely. Docket no. 1315. Defendants argue that the Task Force has had "every opportunity, and every reason, to prove standing." Docket no. 1310 at 8. Defendants contend that during discovery, the Task Force objected to an interrogatory asking it to identify each individual member of the association or its member associations with standing to

assert the claims, asserting a First Amendment privilege. *Id.* at 9.

In response, the Task Force notes that Defendants did request the names of members in 2011 and deposed representatives of the Task Force and two of its constituent statewide organizations,[86] but chose not to ask them to identify individual members who were affected and, following this Court's denial of Defendants' motion to dismiss for lack of standing in September 2011, did not raise the issue again. Docket no. 1313 at 5 n.2. The Task Force asserts that the current membership of HOPE and NOMAR includes Latino individuals who reside and are registered to vote in CD6 and CD26 in Plan C185. *Id.* at 6.

The Task Force's motion for leave to file its membership list under seal (docket no. 1314) is granted, and the Court finds that the Task Force has standing to pursue its *Shaw*-type claims with regard to CD6 and CD26 based on the individual standing of members of its constituent organizations who reside there. The Court initially found that the Task Force had satisfied the pleading standard for associational standing, and neither the Court nor Defendants again raised the issue. Given the undisputed existence of standing with regard to CD6 and the strong likelihood that an individual member of the Task Force's member organizations would have standing to challenge CD26, the Task Force was not dilatory in

---

[86] The Task Force notes that HOPE, MABA, and Southest Worker's Union are statewide membership organizations, and that NOMAR has members who reside in Tarrant and Dallas Counties. Docket no. 1313 at 3. Defendants deposed Celeste Villareal, the legislative director for MABA, as a 30(b)(6) witness for the Task Force. Joint Ex. J-56.

seeking to admit evidence, especially given that the *Shaw* claims have not been a primary focus of the litigation, the issue had not been pressed by Defendants or the Court, and the Task Force had First Amendment and privacy concerns about releasing member information. Defendants are not surprised by this claim and were not so concerned about the issue to have raised it again via motion for summary judgment or otherwise. *See Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (allowing joinder of parties on appeal to address lack of standing and noting that "[t]o . . . require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration").

2. CD26 analysis

The evidence demonstrates (and Defendants do not deny) that Downton used race to assign Latino population into CD26 in Tarrant County (and relatedly, African-American population out of CD26 and into CD12). CD26 is the Denton County-based district that has the so-called "lightning bolt" extension into Tarrant County, and that lightning bolt is completely surrounded by CD12. It is undisputed that early in his mapdrawing process (around May 28, shortly before the first plan C125 was released), Downton used racial shading to make changes "to keep the Black population together" in CD12. TrA1618-21 (Downton); PL-1659. He stated that he made this change (putting "the areas of more concentrated black population" into CD12) in response to concerns raised by Interiano that he had divided the Fort Worth black communities, and he wanted to unite them as part of the principle of keeping communities of interest together, but not for specific compliance with the VRA. TrA1618,

TrA1621-22. He used racial shading because he did not "know Fort Worth at all" and the only way for him to identify the community of interest of "the Fort Worth black population" was racial shading. TrA1619-20 (Downton). Thus race played a predominant role in the original configuration of CD12 and CD26.

Downton also admitted to using race to assign Latino voters into CD26 and African-American voters into CD12 in Tarrant County later in the process. Downton 8-12-11 depo. (Ex. J-62) at 128 (noting that the CD26 lightning bolt contains "most, if not all, the concentrated Hispanic population of neighborhoods in Tarrant County"); TrA1625. But he claimed that this was to remedy a split of north and south Hispanic communities of interest. TrA1768 (he turned on racial shading to keep minority "communities of interest" together). At his 2011 deposition, Downton testified that the original map Plan C125 did not include the lower section of the lightning bolt, which is a largely Hispanic area, but there were "complaints" that he had split the Fort Worth Hispanic population. He stated that there was testimony at the hearing and "there [were] some public posts about it," but he could not remember where he had seen them. Downton 8-12-11 depo. (Ex. J-62) at 129. In the August 2014 trial, Downton stated for the first time that he had seen it on a blog and later identified the blog as gregsopinion.com. TrA1628, TrA1710, TrA1783-84, TrA1803.[87]

---

[87] He testified that the blog had pictures with racial shading showing the two Hispanic areas in different districts. TrA1628. He testified that the blog pointed out that what he thought of as two distinct populations were considered one community. TrA1624. The blog entry entered into evidence by Defendants, D-715, complains only generally that Plan C125 fractures the minority community

Downton stated that mapdrawers "recognized their concern about splitting the Hispanic community" and put them together in one district "to help the Hispanic community" to give them "a solid voting block" that a candidate would need to consider. Downton 8-12-11 depo. (Ex. J-62) at 131-32. Downton also placed the primarily African-American community of Como into CD26 with the newly united Fort Worth Hispanic communities based on his recollection that Rep. Veasey had wanted Como with the Hispanic populations in HD90 in the House map.[88] As

---

throughout the DFW area and connects minority populations to heavily-Anglo populations in surrounding counties. There is a map of DFW shaded by CVAP population, but it does not discuss the Hispanic population in Fort Worth specifically.

[88] At the 2011 deposition, Downton testified that Como, a primarily African-American community, had been placed originally in CD12 but Rep. Marc Veasey, an African-American member, believed it should be placed into CD26 with the Hispanic community because it would fit better there, though he was not sure if he recalled that correctly (he did not). Downton 8-12-11 depo. (Ex. J-62) at 129-30. In fact, as Downton correctly recalled in 2014, Downton modified the original plan to place the African-American community of Como into CD26 along with the newly united Hispanic population because he recalled that Rep. Veasey had wanted Como in "the Democrat Hispanic opportunity district" HD90 in the House map. TrA1625 (Downton), TrA1713-14 (Downton). Rep. Veasey and Rep. Burnam had objected to changes in the House map that removed the Lake Como area from HD90, Rep. Burnam's district, and Rep. Burnam had offered an amendment to return it that was defeated. Based on this recollection, Downton placed the African-American Como community with the Hispanic communities in CD26 when he was uniting the two Hispanic communities. TrA1625. However, Downton stated that Veasey "had different thoughts" about Como in the congressional plan, and that as a result "I moved it later." TrA1625; see also TrA1714 ("Mr. Veasey said that with respect to the congressional

a result, he stated, he put "almost all of the concentrated part" of the Hispanic population in Tarrant County into CD26, except parts excluded to accommodate Congresswoman Granger and the Trinity River Project, and these changes were reflected in Plan C144, Solomons' statewide substitute plan. *Id.* at 132.

The criteria for these assignments was race, and Downton used racial shading to select population. TrA1619 (Downton) (stating that he looked at racial shading at the VTD level and "saw two Hispanic populations, a northern population and a southern population"); TrA1621-22 (Downton) ("I also looked at the Hispanic population and I saw two distinct Hispanic communities. . . . [A]nd so I kept each of those communities together."); TrA1624 (Downton) ("I think this is the map where I tried to put the two Hispanic communities back together. And to do that, I would have pulled up racial shading."); TrA1789 (stating that the characteristics the areas had in common were that they were both Latino and they were both in Fort Worth).[89] Although Downton knew that the Hispanic populations were included in HD90 in the House plan, he did not overlay the contours of HD90 when assigning population into CD26. TrA1711-12 (Downton). Downton admitted that he did not "have any personal knowledge of the community characteristics for the residents who live

---

map, it was more appropriate to have Como with the black population that was in the other district, so he took it back out.").

[89] Racial shading shows that Latino population is captured in CD26 and African-American population is largely excluded and placed in CD12. *E.g.*, PL-1145; PL-1146.

inside the lightning bolt of Congressional 26." TrA1710. He "used racial shading to identify the community of interest that [he was] seeking to place together in [CD]26." *Id.*[90] The Como area was later removed from CD26 and placed back into CD12 as part of an amendment (Plan C169) introduced by Anglo Republican Charlie Geren, which Geren said on the floor was "a swap between Congressional Districts 12 and 26" to make downtown Fort Worth whole, put the entire city of Westlake in the same district, and "unite the black communities in Fort Worth." D-23 at S3. The amendment was adopted. D-23 at S3; TrA1629 (Downton). Thus, it is undisputed that race was an important criteria for the assignment of population into and out of CD26.

Downton testified that he felt it was "damned if you do, damned if you don't" with regard to using race to keep minority communities together in DFW, because if he did not, he would be accused of dividing the minority community, but if he did, he would be accused of improper racial gerrymandering.[91] He testified that he felt it was in

---

[90] Dr. Arrington noted that CD26 in Tarrant County has 38 precinct splits, and further stated that the precinct splits in the so-called "lightning bolt" "split off the Hispanic population" and put it into CD26. TrA410. He found that it was "incomprehensible that it was done on any basis other than race." TrA472. (The Court notes that, while there are 38 precinct splits in CD26 in Tarrant County, 36 are in the lightning bolt, while two are in the short eastern protrusion.)

[91] Judge Smith specifically asked the parties in closing argument to discuss "when if ever is it legitimate to use racial shading whether it's through RedAppl or any other means? Can it be used, for example, to join together minority communities of interest?" TrA1967. In addition, the State of Texas has argued in this case that it did not know how to comply with both the VRA and the Equal

error to split the Hispanic population and although he knew CD12 and CD26 were not protected districts, he felt he was following the "traditional redistricting principle . . . to keep communities of interest together" and "people want to do that and thought we needed to for Voting Rights Act in that district." TrA1745. However, he also stated that he did not personally think that. *Id.* It was not his view that they needed to be kept together, but "people raised the issue" and "a possible legal challenge, so [he] changed it to address that concern and prevent a legal challenge on the basis that it would split up minority groups." TrA1746.

David Hanna of the TLC testified that, with respect to assignment of minority neighborhoods in DFW, his advice was just that minority neighborhoods, either Black or Hispanic, be kept whole, even though he knew they would not be creating a minority opportunity district. TrA1546-47, 1574-76. He did not want there to be a consistent pattern of dividing minority neighborhoods. TrA1574. He examined whether whole neighborhoods were being split up in DFW by looking at racial shading at the

---

Protection Clause. It has also argued recently in an amicus brief before the Supreme Court that redistricting is a "minefield" requiring states to get the use of race "just right." However, the requirements for using race are not that treacherous. Nina Perales identified acceptable uses of racial shading, and noted that "what Mr. Downton did in Tarrant County is probably the example of what you should not do, which is turn on racial shading and simply select people for different congressional districts based on that and that alone, without a knowledge of the community, without a knowledge of socioeconomic status, or cultural, or community patterns. There [has] to be more to it, especially if you're just gathering people together without a remedial purpose." TrA1968.

VTD/precinct level. TrA1547-48, 1568-69. He recalled giving that advice after being asked by Doug Davis or Interiano, but he did not remember to whom he mentioned it. TrA1548, 1569. Thus, he said that he thought that it was better not to divide a black neighborhood or a Hispanic neighborhood and assign those different districts, but he did not express an opinion as to whether Blacks and Hispanics should have been divided from each other or not. TrA1546.

Given the apparent and admitted use of race in assigning population into CD26 in Tarrant County, Plaintiffs contend that strict scrutiny applies and that, because the districts were not majority-minority, no compelling state interest justifies the use of race. Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. *Bush*, 517 U.S. at 958 (O'Connor, J.). Nor does it apply simply because members of racial groups are concentrated in specific districts, as that may be the result of legitimate redistricting principles that have nothing to do with race. *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

However, in this case we have admissions from the mapdrawer that he used race as the sole criteria for assigning a significant portion of voters into and out of CD26, and that his sole basis for regarding them as a community of interest was their race, given that he had no familiarity with the area. "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995). Justice O'Connor recognized that it is evidentially

significant that this is what has occurred if the mapdrawer used racial data but made no apparent attempt to compile or refer to equivalent data regarding communities of interest. *Bush*, 517 U.S. at 967 (O'Connor, J.).[92]

Laws that classify citizens on the basis of race are constitutionally suspect, regardless of whether the reason for the classification is benign or the purpose remedial. *Shaw*, 517 U.S. at 904-05. The essence of a *Shaw* equal protection claim is that the State has used race as a basis for separating voters into districts. *Miller*, 515 U.S. at 911. That is precisely what occurred here, and thus strict scrutiny applies.

A racial classification may be justified if it is narrowly tailored to serve a compelling state interest, such as compliance with the VRA. The narrow tailoring analysis requires that "the legislature have a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama LBC*, 135 S. Ct. at 1274. This standard "does not demand that a State's actions actually be

---

[92] Similarly, Justice Kennedy explained in *Miller*, 515 U.S. at 919, that a State's districting legislation cannot be rescued "by mere recitation of purported communities of interest":

> A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at the polls," it engages in racial stereotyping at odds with equal protection mandates.

Id. at 920 (citations omitted).

necessary to achieve a compelling state interest in order to be constitutionally valid," and legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have good reasons to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id.* (emphasis omitted).[93] The Legislature here did not have a strong basis in evidence for the race-based choice of uniting the north and south Fort Worth Hispanic communities in CD26. Downton, the person who made the decision to place both communities together in CD26, admitted that he did so solely on the basis of race, that he used racial shading to do so, and that he was not himself familiar with the communities he was joining other than that they lived in Fort Worth and were Hispanic. Though he stated that he learned from a blog that he had split what was considered one Hispanic community, that testimony was not credible, and even if it were believed, does not provide a "strong basis in evidence" that these communities should be considered a community of interest apart from their shared race. Moreover, Downton admitted that he personally felt that placing these Latino communities together in a district would not be necessary to comply with either § 2 or § 5 of the VRA, given that they still remained a significant minority without ability to elect in CD26, yet he made the decision to do so. The fact that some decisionmakers and advisors might have been concerned that they would be accused of splitting minority populations if they did not unite these communities in CD26 (and exclude African-

---

[93] These principles were recently affirmed in *Bethune-Hill v. Virginia State Board of Elections*, __ U.S. ___(2017).

Americans to "unite" them in CD12) is insufficient to establish a strong basis in evidence that these race-based actions were necessary to comply with the VRA. *See Shaw*, 517 U.S. at 908 n.4.[94] Accordingly, the Court finds that the use of race in CD26 violates the Equal Protection Clause.

3. CD6 analysis

The Task Force further asserts a *Shaw*-type claim with regard to CD6. CD6 includes all of Ellis and Navarro Counties and joins them to Tarrant and Dallas Counties with divergent finger-like extensions. Approximately half (358,632 persons) of CD6's population comes from Dallas County, while 142,511 persons from Tarrant County are included, and the remainder are the population of Ellis County (149,610) and Navarro County (47,735). Ellis County is 32.7% combined African-American and Hispanic population. Navarro County is 37.9% combined African-American and Hispanic population. The portion ofTarrant County included is 39.2% combined African-American and Hispanic population. However, the portion of Dallas County included is 75.8% combined African-American and Hispanic population. With these areas combined, the population of CD6 is 56.5% combined African-American and Hispanic population and 39.5% Anglo population, but it is only 51.5% combined African-American and Hispanic voting age population, and is majority Anglo (57.7%) CVAP.

---

[94] While complying with the VRA is a compelling state interest, obtaining preclearance and avoiding potential litigation for their own sakes and without a strong basis in evidence that race-based actions are required for VRA compliance are not compelling state interests.

To demonstrate that race-based criteria predominated in the drawing of portions of CD6, the Task Force relies in part on evidence that Downton split numerous precincts and that certain precinct splits (specifically 1105, 1127, 4614, 4610, 4433) place portions with more Hispanic population inside CD6 and areas with less Hispanic population outside of CD6. Docket no. 1308 at 12; docket no. 1274 at 217 (proposed FF 1389-1391) (citing TrA1721-24 (Downton); PL-1155; PL-1156; PL-1157). The Task Force also states that "the bizarre boundaries" of CD6 indicate that race was the predominant factor in its creation. Docket no. 1308 at 12 n.5.

Downton testified that in CD6, he would not have been "drawing to pull in Hispanics" because it was not a Hispanic opportunity district. TrA1720. Downton testified that he thought these splits were "zeroing out," but agreed that some were placing more Hispanic population inside CD6 and less Hispanic population outside CD6. TrA1720-24. However, he also stated that, as he did in CD26, he "would have attempted to keep communities of interest together in 6 as well." TrA1720-21. Although there is some evidence indicating that race was used to allocate some population into CD6, the Court finds that Plaintiffs have failed to demonstrate that race predominated and that other redistricting principles were subordinated to race, such that their *Shaw*-type claim related to CD6 must fail.

D. Intentional vote dilution claims

Some Plaintiffs allege that Defendants violated the Fourteenth Amendment through intentional vote dilution; other Plaintiffs bring intentional vote dilution

claims under § 2 of the VRA; and some Plaintiffs assert both types of intentional vote dilution claims.[95] As noted, an intentional vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). "In the context of single-member districts, the usual device for diluting minority voting power is the manipulation of district lines," either by dividing the minority group among various districts (fragmenting or "cracking") or concentrating minority voters within a district ("packing"). *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). In other words, the "'[d]ilution of racial minority group voting strength may be caused' either 'by the dispersal of [minorities] into districts in which they constitute an ineffective minority of voters or from the concentration of [minorities] into districts where they constitute an excessive majority.'" *Id.* at 154 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)); *see also Shaw v. Hunt*, 517 U.S. 899, 914 (1996) ("a Plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population").[96]

---

[95] The NAACP brings intentional vote dilution claims under the Fourteenth Amendment, but does not appear to bring them under § 2 (instead asserting only results claims). DOJ brings intentional vote dilution claims only under § 2. The Task Force Plaintiffs bring claims under both § 2 and the Fourteenth Amendment.

[96] "When a redistricting plan employs [cracking] in a racially polarized environment, the result is predictable: Like a multimember

Plaintiffs here allege that the Legislature intentionally packed minority voters into CD30 and otherwise cracked minority populations throughout DFW to dilute their voting strength. *E.g.*, docket no. 1277 (Joint Post-Trial Brief) at 11, 57-66. Plaintiffs allege that the one existing minority opportunity district, CD30, was packed "far in excess of what is needed to create an ability to elect district" and that the State deliberately created a packed district to waste minority votes and diminish the possibility of placing minority voters into an additional ability-to-elect district. Docket no. 603 (Joint Advisory) at 13; *see also* docket no. 1279 (United States Post-Trial Brief) at 2.

Plaintiffs further allege that the minority neighborhoods in DFW are cracked into different congressional districts, CD5, CD6, CD12, CD26, and CD33, which will all be dominated by Anglo voters, and in which minority voters cannot elect candidates of choice. *E.g.*, docket no. 603 at 11-13; docket no. 1279 (United States Post-Trial Brief) at 2; docket no. 409 (Quesada Post-Trial Brief) at 9-10. They assert that the district lines are "bizarre in shape because they have been configured

---

plan, [a single-member district plan which fractures a geographically concentrated minority voting population] . . . tends to dilute the voting strength of the minority." *Major v. Treen*, 574 F. Supp. 325, 353 (E.D. La. 1983). "The most crucial and precise instrument of the . . . denial of the . . . minority's equal access to political participation, . . . remains the gerrymander of precinct lines so as to fragment what could otherwise be a cohesive minority voting community. . . . This dismemberment of the [minority] voting community . . . [may have] the . . . effect of debilitating the organization and decreasing the participation of [minority] voters." *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 149 (5th Cir. 1977).

to avoid the creation of a majority-minority district or districts in the North Texas area." Docket no. 603 at 11.

Expert witness Richard Murray testified that minority populations were packed into CD30 and otherwise cracked, and despite the fact that population changes (out-migration of inner-city Anglos and increase in minority populations) are making it easier to draw districts to benefit minority voters, the map intentionally avoids creating any such districts. Tr1044; TrA1397-98. He noted that districts around Dallas and Tarrant Counties "link[] up a lot of these inner-city neighborhoods with folks way out, mostly Anglo folks with a history of polarized voting against minorities and high turnout that are going to overwhelm the minority voters in these inner-city neighborhoods." Tr1044. He noted that many districts outside urban cores were regularly shaped, while in the inner city, "where all this minority growth is occurring," there are convoluted districts and "there's gerrymandering going on here." TrA1395.

Dr. Arrington testified that it was possible to create additional minority opportunity districts (not necessarily Hispanic majority but effective) in DFW, but Plan C185 employed cracking by breaking up large, heavily-populated minority populations into a number of different districts so that they are unable to elect a candidate. TrA407, TrA456, TrA474-75. He stated that mapdrawers "took Anglo-dominated suburban districts and they took fingers from those districts and brought them into the Dallas/Fort Worth area to pick up some of the Hispanic population so that that population becomes cracked." TrA407. Arrington noted that there are four essentially suburban districts that move into Dallas County to pick up approximately 624,000 Hispanics. TrA408; US-758_17

(Arrington testimony powerpoint). And the same pattern exists in Tarrant County—one bizarrely shaped district (CD12) is entirely within Tarrant County, while four suburban districts move into Tarrant County to extract minority population. TrA408-09. He felt this was evidence of discriminatory purpose, as was the bizarre shapes of the districts. TrA407-08. He also testified that, rather than moving in the direction of unifying the growing Hispanic community in DFW, "we've cracked it that much greater than was done in [the benchmark]." TrA475.

1. Applicable standards

In *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980), the Supreme Court held that an intentional vote dilution claim under the Fourteenth Amendment requires proof that the disputed plan was conceived or operated as a purposeful device to further racial discrimination by minimizing, cancelling out, or diluting the voting strength of racial elements in the voting population. The Court noted that the requirement that there be purposeful discrimination for a violation of the Equal Protection Clause set forth in *Washington v. Davis*, 426 U.S. 229 (1976), *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), applied to claims of racial discrimination affecting voting "just as it does to other claims of racial discrimination." 446 U.S. at 66-67.

In *Arlington Heights*, 429 U.S. at 266, the Court noted that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *See also Hunter v.*

Underwood, 471 U.S. 222, 228 (1985) ("Proving the motivation behind official action is often a problematic undertaking."). In *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court recognized "the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race," especially because the "legislature always is *aware* of race when it draws district lines," just as it is aware of a variety of demographic factors. *Id.* at 646 (emphasis in original). However, *Arlington Heights* set forth certain types of circumstantial evidence that may be considered to determine intent, including: the impact of the official action, including whether "it bears more heavily on one race than another"; the historical background of the jurisdiction's decision, particularly if it reveals a series of official actions taken for invidious purposes; the specific sequence of events leading up to the challenged decision; departures from the normal procedural sequence; substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and the legislative history, especially any contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. 429 U.S. at 267-68; *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-89 (1997).

To prove intentional vote dilution under the Fourteenth Amendment, plaintiffs must show both discriminatory purpose and discriminatory effect. *York v. City of St. Gabriel*, 89 F. Supp. 3d 843, 850, 864 (M.D. La. 2015); *Backus v. S. Carolina*, 857 F. Supp. 2d 553, 567

(D.S.C.), *summ. aff'd*, 133 S. Ct. 156 (2012).[97] The role that § 2 and *Gingles* play in intentional vote dilution claims as opposed to results-only claims is somewhat unsettled. Congress amended § 2 of the VRA to allow results-only vote dilution claims in response to the Supreme Court's imposition of an intent requirement, and the Supreme Court established the standard for such results claims in *Gingles* and its progeny. Although Congress noted the difficulty and expense involved in proving intentional discrimination and that charges of purposeful discrimination can have a divisive impact, it expressly stated that voters could seek to prove a violation of § 2 through *either* a results-only claim or a discriminatory purpose claim. *United States v. Brown*, 561 F.3d 420, 432-33 (5th Cir. 2009); *McMillan v. Escambia Cty., Fla.*, 748 F.2d 1037, 1046 (5th Cir. 1984) ("Congress intended that fulfilling *either* the more restrictive intent test or the results test would be sufficient to show a violation of section 2.") (emphasis in original); S. Rep. No. 97-417 at 27 ("The Amendment to the language of section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the

---

[97] To the extent Defendants argue that Plaintiffs' intentional discrimination claims fail because there was no discriminatory effect from the 2011 plans because they were never used, that is more properly viewed as a mootness argument, which the Court has already rejected. The Court will evaluate the discriminatory effect of Plan C185 in terms of its effect on voters had it been used.

jurisdiction in question, results in minorities being denied equal access to the political process.") (footnote omitted).[98]

Because intent is not an element of results-only claims and results-only claims are usually easier to prove, few voters have asserted intentional vote dilution claims since § 2 of the VRA was amended,[99] and thus the Supreme Court has not had occasion to establish a specific analytical framework for intentional vote dilution claims post-amendment and post-*Gingles*.[100] Thus, while there is Supreme Court guidance regarding what plaintiffs must show to prove dilutive effects under the § 2 results test

---

[98] The Senate Report further states that if a § 2 plaintiff chooses to prove discriminatory intent, "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions" would be relevant evidence of intent. *McMillan*, 748 F.2d at 1047 (quoting S. Rep. No. 07-417,at 27 n.108).

[99] *See Veasey v. Abbott*, 830 F.3d 216, 335 n.15 (5th Cir. 2016) (Costa, J., dissenting in part) (noting that "[t]he impact that making the typically easier-to-prove effects test an equally powerful avenue of relief has on purpose claims can be seen from the drop in the number of discriminatory purpose claims brought in voting cases after the 1982 amendments to the Voting Rights Act made effects a basis for section 2 liability").

[100] As the Fifth Circuit has noted, prior to *Bolden*, "there was relatively little judicial interpretation of section 2" and "most courts chose to deal exclusively with the constitutional standards, probably under the assumption that the standard under section 2 was equivalent." *McMillan*, 748 F.3d at 1042 n.9. The Fifth Circuit further noted that, in *Bolden*, the Supreme Court explicitly held that "the language of § 2 no more than elaborates upon that of the Fifteenth Amendment and the sparse legislative history of § 2 makes it clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *Id.* (quoting *Bolden*, 446 U.S. at 60-61).

(*e.g.*, *Gingles* and its progeny) and there is precedent concerning the proof required to show discriminatory intent in intentional vote dilution cases under the Fourteenth Amendment, the level of proof of dilutive effects required in a § 2 intentional vote dilution claim is less clear.

> As one court has stated,
>
> > [T]he effects standard for an intentional vote dilution claim is uncertain, largely because of a dearth of precedent. The cases provide little direct authority as to the requisite degree of dilutive effect for an intentional discrimination claim under either the constitution or the statute. This is so in part because direct evidence of discriminatory intent is relatively rare, and thus plaintiffs generally prefer to bring traditional § 2 vote dilution cases where intent need not be shown, rather than constitutional or statutory intentional vote dilution claims. In fact, since the 1982 amendments to the Voting Rights Act, which eliminated the intent requirement for statutory vote dilution claims, there has been a virtual absence of intentional vote dilution litigation.

Cano v. Davis, 211 F. Supp. 2d 1208, 1248-49 (C.D. Cal. 2002) (citations omitted), *summ aff'd*, 537 U.S. 1100 (2003). The *Cano* court agreed with the plaintiffs in that case that "where invidious intent exists in a vote dilution case, it may be appropriate to relax the first or even second of the *Gingles* pre-conditions, as well as to consider intent in connection with the 'totality of the circumstances' inquiry." *Id.* at 1249. Nevertheless, it held that "plaintiffs in vote dilution cases must still show a

practical effect on the minority group's ability to elect representatives of choice, whether or not intent is shown." *Id.* at 1249-50. The court concluded that the "irreducible minimum" showing would be that a minority group's preferences are regularly defeated by a non-minority bloc of voters. *Id.* at 1250.

After the *Cano* case, the Supreme Court expressly stated in *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009), that it did not consider "whether intentional discrimination affects the *Gingles* analysis" and that its holding (setting forth the majority-minority requirement to satisfy the first *Gingles* factor for a § 2 results claim) "does not apply to cases in which there is intentional discrimination against a racial minority."[101] The Court has not had occasion to further clarify the standard.

A 2011 case, *Committee for a Fair and Balanced Map v. Illinois Board of Elections*, No. 1:11-CV-5065, 2011 WL 5185567, at *3 (N.D. Ill. Nov. 1, 2011), noted that "[t]he circuit courts that have addressed this issue have taken

---

[101] The Supreme Court cited the Unites States' amicus brief arguing that evidence of discriminatory intent "tends to suggest that the jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice, and it is therefore unnecessary to consider the majority-minority requirement before proceeding to the ultimate totality-of-the-circumstances analysis." *Bartlett*, 556 U.S. at 20. In distinguishing intentional vote dilution cases, *Bartlett* also cited *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), in which the Ninth Circuit rejected the County's argument that plaintiffs had to show they could have constituted a majority when they alleged intentional discrimination. The Ninth Circuit held that "to the extent that *Gingles* does require a majority showing [for a vote dilution claim under § 2], it does so only in a case where there has been no proof of intentional dilution of minority voting strength." *Garza*, 918 F.2d at 769.

varying approaches," with the Ninth Circuit in *Garza* holding that both intent and injury must be shown, but that *Gingles*' majority-showing requirement did not apply when there was proof of intentional vote dilution, and the Eleventh Circuit in *Johnson v. DeSoto County Board of Commissioners*, 72 F.3d 1556, 1561-63 (11th Cir. 1996), holding that intent would be considered as circumstantial evidence of discriminatory results in assessing the totality of the circumstances. The Illinois court held that "[a] showing that the drafters of the plan intended to discriminate very well may lead to the conclusion that the plan had its intended effect, but the other factors in the totality of circumstances test are still relevant in resolving the issue." *Committee*, 2011 WL 5185567, at *4. Thus, it concluded, "the first *Gingles* factor is appropriately relaxed when intentional discrimination is shown, but [plaintiffs] will nevertheless have to show that the plan lessened [minority] opportunity to elect a candidate of [their] choice" by satisfying the second and third *Gingles* preconditions. *Id.*

In a later opinion, the Illinois court again re-affirmed and expanded on this framework, concluding that, where a plaintiff shows intentional discrimination, the first *Gingles* precondition is relaxed, though discriminatory intent alone "will not carry the day." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 581 (N.D. Ill. 2011). Thus, "[f]ailing proof of the first *Gingles* factor, [plaintiffs] may show discriminatory effect through circumstantial evidence of discriminatory intent," and including, but not limited to, evidence of bloc voting along racial lines; low minority voter registration; exclusion from the political process; unresponsiveness of elected officials to needs of minorities; depressed socio-

economic status attributable to inferior education and employment and housing discrimination; minority retrogression; manipulation of district boundaries to adjust the relative size of minority groups, including the "packing" of minority votes; proportionality; and the *Arlington Heights* factors. *Id.* at 581-82.

This Court agrees that, when discriminatory purpose (intentional vote dilution) is shown, a plaintiff need not satisfy the first *Gingles* precondition to show discriminatory effects. The Court thus rejects Defendants' argument that Plaintiffs can show intentional vote dilution through packing and cracking only if they show that it prevented the creation of an additional CVAP-majority district. If plaintiffs had to satisfy the *Gingles* test, there would be little point in allowing them to alternatively pursue intentional discrimination claims, as Congress stated its intent to do in the Senate Report. However, plaintiffs still must show some discriminatory effect, and in making that determination, the Court will consider the other § 2 *Gingles* and totality-of-the-circumstances factors.[102]

---

[102] *See United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1574 (5th Cir. 1984) (noting that the "same evidence is relevant to both theories" of intent and results). In *Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982), the Supreme Court stated that evidence of racial bloc voting and lack of success of African-American candidates despite their substantial population bore "heavily on the issue of purposeful discrimination." However, such evidence alone would not be sufficient to prove purposeful discrimination "absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice." *Id.* at 624. To that end, the Court discussed the district court's analysis of the "impact of past discrimination on the ability of blacksto participate effectively in the political process" (such as by contributing to low voter

2. Racial motive

The Court thus turns to whether Plaintiffs have demonstrated a racially discriminatory motive in the drawing of district lines (specifically, by packing and cracking) in the DFW area. A primary difficulty in this case lies in the fact that race and political party affiliation are strongly correlated in Texas, and Defendants contend that they were merely engaged in partisan gerrymandering, which had a foreseeable negative effect on minority voting strength (because cracking Democrats necessarily means cracking minority populations). Defendants argue that they did not engage in intentional vote dilution of minority voting strength, but only of Democrat voting strength.

It is undisputed that Defendants engaged in extreme partisan gerrymandering in drawing the map, ignoring many if not most traditional redistricting principles in their attempt to protect Republican incumbents, unseat Democrat Lloyd Doggett, gain additional Republican seats, and otherwise gain partisan advantage. Defendants do not really dispute the fact that minority populations are

---

registration), "evidence of exclusion from the political process" (exclusion from the Democratic Party County Executive Committee, property ownership requirements, and discrimination in the selection of grand jurors, hiring of county employees, and appointments to boards and committees that oversee county government), evidence that elected officials of the County had been unresponsive and insensitive to the needs of the African-American community, which increases the likelihood that the political process was not equally open to African Americans, evidence of the depressed socio-economic status of African Americans in the County, and other factors that the Court had "indicated enhance the tendency of multimember districts to minimize the voting strength of racial minorities." *Id.* at 624-27.

divided or "cracked" in the plan, but they assert that the cracking was only an effect of partisan gerrymandering, not of discriminatory purpose.

Defendants say all lines were drawn on partisan or other legitimate, non-racial criteria, without racial motive or racial decisionmaking, except where they believed the use of race was necessary to comply with the VRA. Defendants contend that the VRA did not compel the Legislature to draw an influence district or even a performing district for minorities under the circumstances, and also did not protect minorities from the foreseeable effects of political gerrymandering. Because their reason for not drawing minority districts was political, Defendants contend, it was not racially discriminatory. Plaintiffs acknowledge Defendants' partisan intent, but contend that the mapdrawers had both partisan and racial intent and that they used racially discriminatory linedrawing to advance their partisan interests. And they argue that so long as they demonstrate that racial discrimination was a motivating factor, they have made out a prima facie case of discrimination.

Plaintiffs correctly note their burden is not to prove that race was the sole decisionmaking factor or motivation, and that discriminatory purpose need only be "a motivating factor." *Arlington Heights*, 429 U.S. at 265-66; *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016).[103] "Intentions to achieve partisan gain and to racially discriminate are not mutually exclusive." *Veasey*, 830

---

[103] *E.g.*, docket no. 1065 (joint response to MSJ) at 7; docket no. 1080 (Task Force response to MSJ) at 5-6; docket no. 1291 (United States post-trial reply brief) at 8-9.

F.3d at 241 n.30. Upon such a showing that race was a motivating factor, the burden shifts to the Defendants to demonstrate by a preponderance of the evidence that the action would have been taken anyway. *Hunter*, 471 U.S. at 228 ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor."); *Arlington Heights*, 429 U.S. at 270 n.21; *Veasey*, 830 F.3d at 231.

It is undisputed in this case that voting in Texas is strongly racially polarized,[104] and this polarization was reflected in the fact that 93 of the 101 Republican members of the House in 2011 were Anglo, while only 8 of the 49 Democrat members were Anglo. As the Fourth Circuit recently acknowledged, the presence of racially polarized voting provides a strong incentive for intentional discrimination, commonly through vote dilution, because "[i]t is the political cohesiveness of the minority groups that provides the political payoff for legislators who seek to dilute or limit the minority vote" and "racially polarized voting may motivate politicians to entrench themselves through discriminatory elections laws" by targeting groups unlikely to vote for them. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214, 222 (4th Cir. 2016).

---

[104] Defendants dispute the cause of racially polarized voting, the legal sufficiency of racially polarized voting, and the existence of racially polarized voting in Nueces and Kleberg Counties. However, they do not dispute that people of different races vote differently from one another, and that minorities tend to vote Democrat while Anglos (Austin/Travis County excepted) generally tend to vote Republican.

The Supreme Court noted in *LULAC v. Perry* that the Legislature's actions that diluted Latino voting strength in order to protect a Republican incumbent bore "the mark of intentional discrimination." *LULAC*, 548 U.S. at 440. The Supreme Court also recognized that the existence of racially polarized voting resulting in a lack of minority success despite their majority status was highly relevant to the issue of purposeful discrimination in *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). It noted, "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race" such that the "fact that none have ever been elected is important evidence of purposeful exclusion." *Id.* at 623-24.

The Ninth Circuit in *Garza* similarly recognized that partisan motive (specifically incumbency protection) may go hand-in-hand with racially discriminatory purpose. *Garza*, 918 F.2d at 771 (finding that racially discriminatory intent was coupled with the intent to preserve incumbencies and stating that "discrimination need not be the sole goal in order to be unlawful"). The Seventh Circuit in *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) noted that "[s]ince it is frequently impossible to preserve white incumbencies amid a high black-percentage population without gerrymandering to limit black representation, it seems to follow that many devices employed to preserve incumbencies are necessarily racially discriminatory."

Thus, while Defendants assert that the strong correlation between party and race supports their position that what looks like racial discrimination is in fact only partisan discrimination, it is also highly relevant to

Plaintiffs' intentional vote dilution claims. As the United States correctly argues, in an intentional vote dilution claim, "partisanship and intentional vote dilution are not an either/or proposition; the two goals can co-exist, one serving the other." Docket no. 1279 at 72.

However, to some degree, the parties in this case mischaracterize their opponents' positions regarding the impact of the strong overlap between race and politics in Texas. For example, the NAACP claims that the State relies on *Easley v. Cromartie*, 532 U.S. 234 (2001), "for the proposition that the Supreme Court had endorsed discrimination along racial lines so long as race was highly correlated with partisanship." Docket no. 1280 (NAACP Post-Trial Brief) at 9. But that is not Defendants' position. Rather, they argue that the State may draw lines and even intentionally discriminate on the basis of partisanship (politically gerrymander) despite knowing that there is a strong correlation between race and partisanship and despite knowing that such political gerrymandering will foreseeably negatively affect and dilute the vote of minorities. They argue that taking action *despite* its predictable effect on race is not the same as taking action *because of* its effect on race, and so long as its actions are merely the former, there is no intentional race discrimination. In partial support of their position, Defendants rely on certain language from *Shaw*-type racial gerrymandering cases that did not involve claims of intentional discrimination,[105] but they do not argue that

---

[105] *E.g.*, *Bush*, 517 U.S. at 968 (O'Connor, J.) (stating that, if the State's goal is otherwise constitutional political gerrymandering, it is free to use various kinds of specific political data to achieve that goal "regardless of its awareness of its racial implications").

these cases stand for the proposition that racial discrimination is valid so long as race and politics are highly correlated.

In that vein, the Court agrees with Defendants that statements made about determining motive in the *Shaw*-type cases can have application to intentional vote dilution cases, even though *Shaw*-type cases involve a different motive than intentional vote dilution cases. All parties agree that an intentional vote dilution and a *Shaw*-type racial gerrymandering case are analytically distinct. Nevertheless, Defendants correctly point out that both are based on the Equal Protection Clause and both are fundamentally based on the use of race in districting decisionmaking. In a *Shaw*-type claim, we are not concerned with discriminatory versus benevolent motive, only whether race was the predominant motive in the decisionmaking, while in an intentional vote dilution case, we look to see whether intentional racial discrimination was a motivating factor in the districting decision. Whether partisanship provides an explanation for the specific lines that were chosen is relevant to both motive inquiries. Thus, the Court disagrees with statements such as the NAACP's proposed conclusion of law 223 (docket no. 1281) that "correlation between party and race, such as that discussed in *Cromartie v. Easley*, 532 U.S. 234 (2001) and *Bush v. Vera*, 517 U.S. 952 (1996) is irrelevant in cases where vote dilution is alleged." *See LULAC v. Perry*, 548 U.S. 399, 515 (2006) (Scalia, J., dissenting) (citing *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999), a *Shaw*-type racial gerrymandering case, in the context of an intentional vote dilution claim analysis, for the proposition that "a jurisdiction may engage in constitutional political gerrymandering, even if it so

happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact") (emphasis in original).

Defendants, however, also mischaracterize Plaintiffs' argument as being that because most minority voters prefer Democratic candidates, intentionally protecting Republicans amounts to intentionally disfavoring minority voters. Docket no. 1272 at 18. Defendants also incorrectly argue that "Plaintiffs refuse to acknowledge any distinction between partisan and racial motivation." *Id.* at 20. Plaintiffs do not argue that partisan motivation favoring Republicans is automatically racially discriminatory motivation against minorities, who generally vote Democratic. Rather, they argue that Defendants intentionally discriminated on the basis of race to gain partisan advantage and protect incumbents, and that this constitutes racially discriminatory purpose.[106] *See, e.g.*, docket no. 1279 (United States Post-Trial Brief) at 14 ("The use of precinct splits is critical evidence that state officials used race as a proxy for

---

[106] Defendants refer to the United States' argument that the Legislature's intentional decision not to create a minority opportunity district was intentional vote dilution to support their position that Plaintiffs are arguing that any decision not to create a Democratic district is intentional vote dilution. Docket no. 1272 at 22-23. However, the United States' position is that intentionally refusing to draw a minority district required by the VRA because it would be a Democratic district is intentional vote dilution in violation of § 2. The United States also argues that the mapdrawers went to great lengths to prevent the creation of minority districts by cracking and gerrymandering. TrA2151 (Mr. Mellett) ("you can't prevent a district from coming to be by cracking, packing, going to extraordinary lengths to make sure it does not occur, and that is what we are arguing is done here").

partisanship and that map drawers intentionally reduced minority political opportunity for a partisan political purpose in the 2011 Congressional and House plans.").

In addition, the Court agrees with Plaintiffs that they need not prove race-based hatred or outright racism, or that any particular legislator harbored racial animosity or ill-will towards minorities because of their race. *See McCrory*, 831 F.3d at 222-23, 233 (intentionally targeting a particular race's access to the franchise because its members predictably vote for a particular party is discriminatory purpose even absent any evidence of race-based hatred and despite the obvious political dynamics, and a finding of intentional discrimination does not mean that any member of the legislature harbored racial hatred or animosity toward any minority group); *Veasey*, 830 F.3d at 335-37 (Costa, J., dissenting in part) (a finding of discriminatory purpose is not tantamount to a finding of racist motivation). If the Republican-dominated Legislature targeted voters who, based on race, were unlikely to vote for Republicans, that constitutes racial discrimination even if done for partisan ends. *McCrory*, 831 F.3d at 233; *Veasey*, 830 F.3d at 336 (Costa, J., dissenting in part) ("That most basic of human instincts—self-preservation—can thus provide an explanation for enacting a law at least in part because it will have a disparate impact on protected groups that favor the out-of-power party.").

As Judge Kozinski explained in *Garza v. County of Los Angeles*, a finding of intentional discrimination is not a finding that legislators harbored any ethnic or racial animus, in terms of dislike, mistrust, hatred, or bigotry,

toward minority communities. He illustrated the point as follows:

> The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

918 F.2d at 778 n.1 (Kozinski, J., concurring and dissenting in part). Thus, if the "desire for partisan advantage . . . leads a legislature to select 'a course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group,' that is enough." *Veasey*, 830 F.3d at 336 (Costa, J., dissenting in part) (citing *Garza*, 918 F.2d at 778 (Kozinski, J.)).

With these principles in mind, the Court turns to the issue of whether Plaintiffs have demonstrated that mapdrawers chose certain district lines *because* of race and with a racially discriminatory purpose. While there is certainly an overlap between cracking and packing Democrats and cracking and packing minorities, the

Court finds that Plaintiffs have satisfied their burden of showing that intentional minority vote dilution was a motivating factor in the drawing of district lines in DFW and that mapdrawers intentionally diluted minority voting strength in order to gain partisan advantage.

The Court has already found that the Republican-dominated Legislature viewed minority districts as Democrat districts and was generally unwilling to create any districts in which minority voters could elect their representatives of choice unless they felt compelled to do so by the VRA. The Court has further found that mapdrawers were willing to disadvantage minorities to gain partisan advantage, as was done in CD23, and that they were willing to use race to gain partisan advantage, as was done in drawing race-based CD35 in Travis County to destroy the Democrat district CD25 and limit the number of Democrat districts overall. Further, because the Republican-dominated Legislature and the mapdrawers felt that the VRA created and protected Democratic districts, they consistently took the most restrictive positions on the VRA.[107] Thus, the record

---

[107] Mapdrawers and decisionmakers testified that a district that could potentially perform for minority voters in DFW, both Hispanic and African American, was viewed by mapdrawers and legislative decisionmakers as a "Democrat district." TrA351 (Interiano) (Congressman Smith's proposed district "would have simply been an additional Democratic district), TrA381 (Interiano) (unless required by the VRA, "we should not be giving a Democrat district"); TrA1604 (Downton) (according to conversations with Solomons, there were not votes to pass any plan that did not have three Republican districts out of four, but Smith's plan was a 2-2 Republican/Democrat district); TrA277 (Seliger) (minority districts were "without question" thought of as Democrat districts), TrA287 (stating that maps proposed by minority members that created a minority district in DFW were just

indicates not just a hostility toward Democrat districts, but a hostility to minority districts, and a willingness to use race for partisan advantage.

In addition, the evidence shows that mapdrawers were more than just "aware of" race; they often referred to race in discussing the drawing of districts, they paid close attention to the racial makeup of all districts, and they engaged in discussions about how to gain political advantage by disadvantaging Hispanic voters through use of the "nudge factor." *E.g.*, Tr912 (Downton) (mapdrawers "were always conscious of the [race] numbers, and so we would look at them throughout the process before moving forward with the map"); D-122 (Hanna memos on House proposals, which focused on percentages of racial minority populations within minority districts); US-75 (Opiela "nudge factor" email to Interiano and Lisa Kaufman proposing to manipulate

---

designed simply for Democratic seats). Downton and other decisionmakers in the Republican-dominated legislature took the position that only a single majority-minority CVAP district would be required by § 2 despite the fact that Supreme Court precedent regarding coalition districts was unsettled, the Fifth Circuit had held that they could be required by § 2, and they had been advised by TLC lawyers that they could be required. D-590 at 85. In drawing the House plan, they had taken the position that the Texas County Line Rule would trump § 2 unless told otherwise by the courts to avoid drawing new minority districts, again against the advice of TLC lawyers. TrJ1208-09; D-590 at 38-39. In addition, there is no indication that mapdrawers or Republican leadership asked David Hanna for a VRA analysis of the proposed congressional plan even though they had for the House plan (and Seliger had stated at a hearing that maps would be scrutinized by Hanna), and they ignored concerns that were raised about VRA compliance (such as in CD23) that interfered with their partisan goals.

districts to increase Hispanic population metrics while keeping SSVR and Hispanic turnout low); US-76 (Opiela email to Lamar Smith and Interiano, later forwarded to Denise Davis, (Speaker Straus's Chief of Staff) referring to having to "pick up Anglo voters" "to avoid packing claims on Hispanic districts").[108] Although Opiela, who originally proposed the "nudge factor," may not have had as significant a role in the ultimate specific lines in the plan as Plaintiffs contend, he was undoubtedly an insider to the process—he was friends with mapdrawers; he was frequently in the office, even referred to as "frequent flier" by the committee clerk Bonnie Bruce; he made requests and gave input; and he engaged in numerous discussions with mapdrawers Downton and Interiano.

---

[108] One Judge in *Veasey* found it notable that, despite being "granted wide-ranging and invasive discovery into potentially privileged internal correspondence of the Legislature," including email, plaintiffs in that case "uncovered not a single slip of the tongue or errant statement indicative of a racially discriminatory motive." *Veasey*, 830 F.3d at 287-88 (Jones, J., concurring in part and dissenting in part). The Court notes that, in this case, there are very few emails among Interiano, Downton, Solomons, Seliger, and Doug Davis concerning redistricting. The Court finds that these key players generally discussed redistricting in person and not by email, which explains the lack of email evidence. Downton repeatedly referred to discussions he had with Solomons and others, but few to none of these occurred by email. Solomons and others repeatedly referred to the fact that they were highly aware that the maps would end up in court, and the Court finds that they took intentional steps to avoid creating an email record of their discussions. *See* PL-311 (docket no. 324-3 at 55) (email expressing dissatisfaction with the fact that Dub Maines was criticizing the proposed plan in an email when it would likely end up in court, forwarded by Lamar Smith to Opiela and Interiano).

More importantly, Downton admitted that once the decision was made not to create a minority coalition district in DFW, it became more difficult to draw "strong" Republican districts,[109] and Downton and the other decisionmakers knew it would also be more difficult to maintain these districts as Republican across the decade as minority population continued to grow (and outpace Anglo growth). One way to solve this problem was to pack and crack minority voters.

Packing would be achieved by increasing the number of minority voters in the existing African-American opportunity district CD30 and moving Anglo voters out of CD30 and into the Republican districts, and the evidence demonstrates that this was in fact done. In Plan C185, all CD30 Hispanic and African-American population metrics increased from the benchmark: total African-American population increased from 42.4% to 45.6%, BVAP increased from 42.5% to 46.5%, and BCVAP increased from 49.8% to 53.1%; total Hispanic population increased from 39.7% to 40.3%, HVAP increased from 34.7% to 35.6%, and HCVAP increased from 19.8% to 20.6%. Anglo population metrics correspondingly decreased. Defendants contend that there is no evidence "that African-Americans were packed in District 30 in Plan

---

[109] TrA1606 (Downton) ("One of the reasons the Republican congressional delegation proposed that [minority] district was because it protected all the incumbent congressmen by taking Democratic votes and concentrating them in a new district. It allowed the percentage of Republicans in the old districts to increase by nine. Drawing [Anglo-majority, Republican CD33 in Plan C185 instead], it became much harder to balance all of the existing districts with the new district, to where the congressmen felt that they still had strong Republican districts.").

C185 because the voting age population and citizen voting age population are largely the same as under Plan C100." Docket no. 1276 at 83 (proposed FF 772). Although it is true that minority population metrics are not drastically increased, they are increased.

Benchmark CD30 was slightly overpopulated (by approximately 8,000 persons), was at the 50% BCVAP threshold that Downton and mapdrawers had set for opportunity districts (it was 49.8% Black alone CVAP using 2005-2009 ACS data and 50.3% combined BCVAP), and was performing effectively and reliably for African-American voters. Therefore, no additional African-American population would have been needed to be added to CD30 to comply with the VRA.[110] Yet the district was changed significantly, without any input from Congresswoman Johnson or respect for the integrity of the district other than its racial composition.[111]

---

[110] *See Bush v. Vera*, 517 U.S. 952, 983 (1996) (an increase from 35.1% to 50.9% African-American population was not narrowly tailored to comply with the VRA because there was no showing that it was necessary to ensure nonretrogression); *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at *17 (E.D. Va. June 5, 2015) (an increase in BVAP from 53.1% to 56.3% was not narrowly tailored where the district had been a safe majority-minority district for two decades). Downton and mapdrawers took the position that as long as a district was above 50% CVAP of a single minority, nothing else was required for § 2, and that § 5 compliance meant only that the relevant population metrics and election performance remained the same as in the benchmark plan. Thus, under their interpretation of the VRA, no increases in minority population would be necessary to comply with the VRA.

[111] Congresswoman Johnson testified in detail about the negative changes to her district, including the removal of her home, her office, and what she considered to be "economic engines." She and Dr.

A plan overlap analysis shows that 80.7% of the old CD30 population is included in the new district, and the new population taken from surrounding districts CD5, CD24, and CD32 is overwhelmingly minority. Of the approximately 6,000 persons taken from CD5, only 27.4% are Anglo.[112] Of the approximately 75,000 persons taken from CD24, only 25.7% are Anglo. And of the approximately 54,000 persons taken from CD32, only 16.5% are Anglo.[113] The population changes resulted in a decrease of 26,214 Anglos (25,677 of voting age), and a corresponding increase of 19,290 African-Americans (12,127 of voting age) in CD30.[114] Moreover, the contours of CD30 coincide with maximizing minority population; except for a few places in the north central portion of the district and the southeastern portion of the district, the boundaries consistently exclude heavily Anglo areas and include heavily minority areas.

Murray also expressed concerns about population changes to the district that could undermine its long-term status as an African-American district.

[112] Of the 31,000 persons moved into CD5 from CD30, 36.2% are Anglo.

[113] In contrast, of the approximately 68,000 persons moved from CD30 to CD32, 61.1% are Anglo. No population was moved from CD6 to CD30, but a large amount of Hispanic population (approximately 43,000 who were 82.5% Hispanic) was moved from CD30 to CD6. As discussed below, this is because CD6 was not in Dallas County in the benchmark, but in Plan C185 it reaches into Dallas County to take minority population.

[114] Although Hispanic total population increased by 1,157, HVAP actually declined by 1,810. However, as these voters became voting age, the HVAP of CD30 would increase over the decade. Further, the total Hispanic + African-American population increased by 20,147 and the combined voting age population by 10,219.

CD30 has 31 split precincts along its borders (three precincts are split twice, resulting in 34 total splits),[115] and the causes of these splits were generally unexplained by Downton or any defense witnesses. As noted, while accurate racial data is available below the precinct level, accurate political data is not, and any testimony that mapdrawers were not aware of this fact is not credible,[116]

---

[115] To compare, the border of the lightning bolt in CD12 and CD26, where Downton admitted to using race, has 36 split precincts.

[116] The Court notes that Downton claimed to have studied redistricting law, and he surely would have studied *Bush v. Vera*, 517 U.S. 952 (1996), one of the more recent Supreme Court cases involving Texas redistricting.In that case, Justice O'Connor expressly noted that RedAppl "contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts (which approximate election precincts)." *Id.* at 961. Further, the TLC's publication *Data for Redistricting* noted this limitation, and emails from TLC providing information noted this limitation in the data. PL-728 (Data for Redistricting publication) at 11-12; US-185 (email from Davenport of TLC to Interiano noting allocation issues). Thus, it is simply not credible that Downton or other mapdrawers were unaware of this fact.

In addition, Downton's testimony that he did not worry about splitting precincts because there was no policy against it is also unconvincing. If split precincts were not an issue, then Solomons would not have used split precincts to argue against minority members' proposed changes, and members would not have been told to avoid splitting precincts when drawing the House map. Rep. Pickett of the El Paso delegation testified that they were told not to split precincts. Downton claimed this was so that the members' pieces could be fit together more easily in the House map, but this explanation makes no sense with regard to counties such as El Paso, which were going to be "dropped in" to the House map. Downton knew that splitting precincts was disfavored and that accurate

suggesting that many precinct splits have a racial basis. *See Bush*, 517 U.S. at 961-62 (O'Connor, J.) (noting that the availability of block-level racial data "enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information"). Dr. Arrington's split precinct analysis indicates that although split precincts included more voting-age Anglos in CD30 than were excluded, this was *more true* for Hispanics and African-Americans.[117]

Defendants contend that the allegations concerning split precincts "rest on speculation and factual misstatements." Docket no. 1272 at 35. Defendants concede that accurate political data was not available at the precinct level, but note that RedAppl statistics nevertheless reflected changes in political data when precincts were split. Defendants also state that precincts may be split, and were split, for non-racial reasons, such as following city boundaries, including financial supporters, following roads, incorporating airports and government buildings, including a member's home, and complying with the Texas Election Code. *Id.* at 36. They assert that, to the extent any precincts were split on the basis of race, it was only to comply with the VRA. *Id.*

However, neither Downton (nor anyone else) ever explained why the population metrics of CD30 were

---

political data was not available, yet split precincts anyway, indicating the use of racial data to do so.

[117] In CD30, 4,250 BVAP individuals were excluded in split precincts, while 17,192 were included. US-352 (Arrington Decl.) at 56, Table 21. 17,358 HVAP individuals were excluded, while 25,502 were included. *Id.* 11,947 Anglo VAP were excluded, while 17,535 were included. *Id.*

changed in the way that they were or why these 31 precincts were split.[118] He testified that each time he made changes in an area, he split precincts to equalize population, so that there might be a lot of split precincts in an area that he worked on more regularly (such as Tarrant County). TrA1718. But there were not so many changes in this portion of the map as it progressed that the numerous splits could be explained simply by repeated population equalization, nor have Defendants shown that the splits were in fact caused by neutral reasons, other than providing generalities and speculation.[119] Thus, the evidence indicates that the splits were likely race-based, and Defendants fail to proffer a non-racial basis for the numerous precinct splits in CD30.

Further, Downton's testimony is consistent with a racial packing motive— he testified that he was trying to maintain all the existing Republican Dallas districts at a certain Republican percentage, and packing minorities into CD30 while removing Anglo (and thus presumably Republican) voters and placing them into adjacent districts is consistent with that stated goal. Plaintiffs have

---

[118] Downton testified that mapdrawers "tried to make sure we were maintaining levels of HCVAP in the Hispanic districts and black voting age population in the black districts," Tr914 (Downton), and never indicated that there would have been a need to increase the minority population in CD30.

[119] CD30 did not change much between the time of the initial Solomons Plan C125 and the enacted plan. Therefore, any splits due to "zeroing out" caused by changes to the districts would have had to exist in Plan C125. The Court is not aware of any split precinct reports in the record that would show the progression of split precincts in the map as it was developed before Plan C125 was released that might support Downton's explanation.

shown that minorities were moved into CD30 and Anglos were removed, and Defendants have not pointed to any evidence showing that Democrats (who happened to be minorities) were packed into CD30 while Republicans (who happened to be Anglos) were removed. Thus, CD30 demonstrates a classic racial gerrymandering technique of packing minority voters into CD30 to waste their votes, while moving Anglos into neighboring districts to increase their Republican performance. The Court finds that race was used as a proxy for political affiliation, and that this was done intentionally to dilute minority voting strength.

To support their claim that minority populations in DFW were otherwise intentionally cracked, Plaintiffs point to the bizarre shapes of the districts and the numerous split precincts in the various DFW districts.[120] The Court agrees that the bizarre shapes and the numerous split precincts, which indicate the use of racial data, support an inference that the mapdrawers intentionally used racial criteria to split the minority population.[121]

---

[120] MALC asserts that overlays of districts 12, 26, 6, and 33 with minority population concentrations show "that the jagged and extremely odd shapes were used to gather minority populations and place them into Anglo-dominated congressional districts." Docket no. 1275 at 36 (proposed FF 188). The Task Force argues that the lines more closely track race than partisanship. TrA2134-35 (Ms. Perales). As discussed above, mapdrawers admit that the lines of CD12 and CD26 are partly based on race.

[121] The Court acknowledges that while bizarre shapes are evidence of gerrymandering, they may be evidence of political gerrymandering and not necessarily racial gerrymandering. However, considering all the evidence, including the precinct splits and the map progression (discussed *infra*), the Court finds that the bizarre shapes are at least in part due to racial gerrymandering.

More importantly, however, expert George Korbel noted that the map looked as though mapdrawers started out with the district they wanted to avoid, and then carved it up into pieces, Tr669, and the progression of the maps in Downton's RedAppl account bears this out. Plan hrc1C109 from late April contains the same proposed minority coalition district from a map provided by Opiela on behalf of the delegation (hrc1C104). Plan hrc1C116 ("labeled Congressional 5/3") still contains a possible minority coalition district (CD33), though modified somewhat from Opiela's district (Downton stated that he modified the delegation's district to try to get it above 50% HCVAP), and then hrc1C119 returns to the delegation's proposed district (or a district substantially similar to it). By hrc1C124, however, DFW begins to take its final shape, and the minority coalition district is removed, now divided up (cracked) primarily among CD6, CD12, CD26, and CD33.[122]

The CD26 extension from Denton County is extended and now includes a significant portion of what had been in

---

Further, although there are some precinct splits with obvious non-racial explanations, such as tracking the boundaries of cities (this appears to be the case with respect to the cities of Southlake, Grapevine, Lewisville, and Coppell along the southern portion of Denton County, as well as the boundaries of CD12 along North Richland Hills), most of the district lines in Dallas County do not appear to particularly follow city boundaries or have obvious non-racial bases.

[122] The Court notes that Defendants had offered an exhibit (D-509) of maps and reports for each of the congressional plans in the hrc1 account, but later withdrew this exhibit. United States exhibit 731 contains shapefiles of the plans discussed here, and the Task Force has submitted exhibits showing some of the shapefiles as well.

the minority district, including what Downton referred to as the northern Fort Worth Hispanic community. CD12 and CD33 then take the other portions of what had been in the minority district in Tarrant County, including what Downton referred to as the southern Fort Worth Hispanic community, and CD6 shifts east into Dallas County to take a large portion of the former proposed minority district within that county. CD24 remains largely the same, as do portions of the border between CD30 and CD32, indicating that this was not a new map drawn from scratch, but a modification of the prior map that essentially dismantled the minority district.[123] The fact that the minority district was drawn and then cracked is demonstrated by overlapping the maps as follows:

This contradicts Defendants' assertion that once Downton determined that he could not draw a 50%-HCVAP district, he simply drew districts based on partisan criteria. The progression of his maps demonstrates that he included a minority district in the map, then cracked it into Anglo-majority districts. This is consistent with a motive to disadvantage minorities, not Democrats.

---

[123] This configuration remains in hrc1C130 ("Congressional Ryan Merge 5/20") (PL-1134), and then further modifications are made to include the Trinity River Project and North Richland Hills in CD12 in hrc1C131 ("Congressional Ryan Merge 5/23") (PL-1135). Thus, while the Trinity River Project and inclusion of North Richland Hills in CD12 did help shape the final district configurations in Tarrant County, Downton initially cracked the proposed minority district before making these adjustments.

Moreover, it is consistent with a motive to crack and limit *minority* population within the Republican districts to curb the effect of continued minority growth (in contrast to Anglo decline or stagnant growth) throughout the decade—to keep the districts "safe" Republican districts as long as possible. Downton cracked minority populations, not just Democrat populations, and dispersed them within Anglo-dominated districts to account for future growth, to ensure that the minority populations would not grow sufficiently to control the district for as long as possible. Thus, the mapdrawing process itself demonstrates cracking of minority populations to disadvantage minority voters.

The Court finds that this evidence persuasively demonstrates that mapdrawers intentionally packed and cracked on the basis of race (using race as a proxy for voting behavior) with the intent to dilute minority voting strength. The Court also finds that the *Arlington Heights* factors further buttress a conclusion of intentional discrimination.

Defendants argue that none of the *Arlington Heights* factors are established or point to a finding of intentional racial discrimination, and contend that Plaintiffs improperly view the factors as boxes to be checked to

prove their claim or as establishing a *prima facie* case. However, the *Arlington Heights* factors are permissible areas of inquiry, that when viewed in totality with other evidence in the record, may provide an inference of racial discrimination, given that government actors will rarely provide direct evidence of discrimination. *See Hunt v. Cromartie*, 526 U.S. t541, 553 (1999) (noting that outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence); *Veasey*, 830 F.3d at 230 n.12 ("[W]e have noted that discriminatory intent . . . may be shown through circumstantial evidence, as discriminatory motives are often 'cleverly cloaked in the guise of propriety.'").[124]

The Supreme Court has stated that *Arlington Heights* provides guidance for assessing a jurisdiction's motive in enacting voting changes and "set[s] forth a framework for analyzing 'whether invidious discriminatory purpose was a motivating factor' in a government body's decisionmaking." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997).[125] Consideration of the *Arlington Heights* factors, when viewed in totality with the entire record evidence, may support a finding of intentional

---

[124] As the Fourth Circuit recently recognized, such a holistic inquiry is particularly important today, where discrimination is achieved more subtly and through more sophisticated devices. *McCrory*, 831 F.3d at 221; *see also Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (noting the "demonstrated ingenuity of state and local governments in hobbling minority voting power" as "jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices").

[125] In *Reno*, the Supreme Court referred to *Arlington Heights* as establishing both a "framework" and a "test" for evaluating purpose. *Reno*, 520 U.S. at 488-89, 490.

racial discrimination, even where the individual factors considered alone are not compelling. *McCrory*, 831 F.3d at 233 (district court erred by considering each piece of evidence in a vacuum rather than engaging in the totality of the circumstances analysis because "[a]ny individual piece of evidence can seem innocuous when viewed alone, but gains an entirely different meaning when considered in context"). Thus, the Court rejects Defendants' attempt to limit the analysis to each individual factor in isolation.

Concerning the impact of the plan, Plaintiffs rely heavily on the fact that, despite the overwhelming and concentrated minority population growth and the decline in Anglo population in the DFW area, no new minority opportunity districts were drawn.[126] Further, minority voters' share of statewide proportional representation actually decreased. Plaintiffs argue that "[t]he only way the minority community would lose their proportion of seats is if a purposeful series of decisions were made to the detriment of the minority community" and "that is exactly what happened." Docket no. 1228 (MALC closing argument summary) at 4. Dr. Ansolabahere noted that Plan C185 "falls short of what might reasonably have been expected for Hispanic and black representation following

---

[126] Plaintiffs note that the combined total population of Dallas and Tarrant Counties roughly equals Harris County's total population and the combined African-American and Latino population of Dallas and Tarrant Counties is nearly the same as in Harris County, yet Harris County has three minority opportunity districts while the DFW area only has one. *See, e.g.*, docket no. 1277 at 58. Because the Harris County African-American districts (CD9 and CD18) already existed, mapdrawers felt they had to maintain them to avoid retrogression under § 5 even though they were not BCVAP-majority districts using available CVAP data.

the 2010 Census and reapportionment." Joint Expert Ex. E-15 at 5.[127]

All of the population growth in Dallas County was attributable to minorities, since Anglo population actually declined by about 200,000, yet this is not reflected in Plan C185. Under Plan C100, CD24, 30, and 32 had a majority of their population in Dallas County, and CD5 had a plurality. Anglos controlled all of the districts except CD30 (3 of 4). Under Plan C185, Dallas residents are the majority of the population in CD6, 30, and 32, and are a plurality in CD5 and 24 (Ansolabahere considers these the five Dallas districts). Joint Expert Ex. E-15 (Ansolabahere report) at 22. Anglos are majority or plurality in all of the districts except CD30 (4 of 5) even though they are now only about 33% of Dallas County's population. *Id.* at 22-23. Thus, the minority group has a majority of seats. *Id.* African-Americans were and remain the plurality in CD30. *Id.* Hispanics, who are a plurality of the county's population (38%), are the plurality or majority in no districts. Ansolabahere report (Joint Expert Ex. E-15) at 22, Table 7 (depo. at 84). 90% of Anglos in Dallas County live in districts in which their race is the majority, compared to 58% of African Americans and 0% of Hispanics. *Id.* at 23.

In Tarrant County, Anglos are approximately 52% of the County population but are the majority in both districts that are based in Tarrant County, as well as the four districts that take some part of Tarrant County. *Id.*

---

[127] Dr. Ansolabahere found that, statewide, Plan C185 *reduced* the number of African Americans and Hispanics in minority ability-to-elect districts by 781,408 persons. Rod-914 (January 2012 Report) at 31.

at 24. None of the 270,000 African Americans (who are 14% of the population) or the 480,000 Hispanics (who are 27% of the population) are in a district in which they are a plurality or majority. *Id.*

Although Defendants contend that Plaintiffs are asserting a proportionality argument and that § 2 expressly provides that it does not create a right to proportional representation, Defendants again mischaracterize Plaintiffs' argument. Plaintiffs are not asserting a right to proportional representation, but are instead arguing that the failure to increase (and in fact creating a plan that results in a *decrease* in) proportional representation despite the minority population growth and the decline in Anglo growth, is evidence of intentional discrimination and purposeful dilution. *E.g.*, docket no. 1282 (Task Force Post-Trial Brief) at 68 ("In the face of shifting demographics, and the increase in the number of Latino eligible voters in Texas from 2000 to 2010, the State's refusal to create additional Latino opportunity congressional districts is circumstantial evidence of an intent to limit Latino electoral strength in the new redistricting plans."); docket no. 1279 (United States Post-Trial Brief) at 15-16 (the most relevant circumstantial evidence of discriminatory purpose is the fact that despite massive minority population growth responsible for Texas gaining four seats, Texas did not create any new minority opportunity though it easily could have done so). On that issue, the law is clear that "the impact of the official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions." *Reno*,, 520 U.S. at 488. "[A] jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a

discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact." *Id.*; *see also Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("One may suspect vote dilution from political famine . . . .").

Besides the fact that proportionality is always a relevant consideration in a § 2 vote dilution analysis and lack of proportionality is probative evidence of vote dilution, *De Grandy*, 512 U.S. at 1025 (O'Connor, J., concurring), the effect on proportional representation is also relevant to determining whether the plan bears more heavily on minorities than Anglos. *See Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 315 (D. Mass. 2004) (noting that "[i]n the face of a burgeoning minority population, this sort of [proportional] retrogression counts in the plaintiffs' favor"). The United States contends that Plan C185 is more dilutive than the benchmark plan because it widened the representation gap. Docket no. 1279 at 16-17. The United States argues that Hispanic and African-American citizens make up about 38.2% of the State's CVAP (using 2006-2010 ACS data), such that proportionality would be 12/32 districts in Plan C100 and 14/36 districts in Plan C185. *Id.* at 17. Because there were ten opportunity districts in the benchmark plan and there remain ten opportunity districts in Plan C185, the United States argues that the representation gap increased from two to four, thereby further diluting minority voting strength. *Id.* The District Court for the District of Columbia agreed with the concept of this argument in the § 5 preclearance litigation when it found the plan to have a retrogressive effect and

denied preclearance.[128] *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013). It found:

> [T]he representation gap in Texas has increased. The Black and Hispanic communities currently make up 39.3% of Texas's CVAP. Joint Stipulations of Fact ¶ 38. Thus, if districts were allocated proportionally, there would be 13 minority districts out of the 32 in the benchmark (39.3% of 32 is 12.6). Yet minorities have only 10 seats in the benchmark, so the representation gap is three districts. In the enacted plan, proportional representation would yield 14 ability districts (39.3% of 36 is 14.1), but there are still only 10 ability districts. Thus, the representation gap in the enacted plan is four districts. Because this gap increases by one district, we cannot preclear the enacted plan.

Id. at 158 (footnotes omitted). This Court also agrees.

---

[128] The majority in *Veasey v. Abbott*, 830 F.3d 216, 240 (5th Cir. 2016) noted that the "same Legislature that passed SB 14 also passed two laws found to be passed with discriminatory purpose," citing the D.C. District Court's decision on § 5 preclearance of these maps in *Texas v. United States*, 887 F. Supp. 2d 133, 159-66 (D.D.C. 2012), even though this opinion was vacated pursuant to *Shelby County*. In response to the dissent's attempt to "discredit" the case because it was vacated, the Fifth Circuit majority noted that "the opinion was not vacated on the merits and remains factually relevant as a contemporary example of State-sponsored discrimination based on the finding of a three-judge federal court." *Id.* at 257 n.54. Thus, the Court finds that the D.C. Court's conclusions under its § 5 analysis may be considered in this case.

Further, although Hispanic populations are sufficiently concentrated that most are placed in Hispanic-majority districts in South and West Texas in Plan C185, minorities and Anglos are treated quite differently in Plan C185 overall, with many Hispanics stranded in Anglo-majority districts. In Plan C185, White non-Hispanics of voting age are overwhelmingly placed in districts in which the majority are White non-Hispanics: 83% of White non-Hispanics reside in districts where a majority of the population is White non-Hispanic of voting age, and 88% live in districts in which a majority or plurality are White non-Hispanics. Ansolabahere Report (Joint Expert Ex. E-15) at 14-15.

In comparison, minority voters are treated quite differently. *Id.* at 15. Although there are three million African-Americans (12% of the State's population), there are no majority-Black districts in terms of voting age population, and only 21% of the Black voting age population is in a Black-plurality VAP district. *Id.* at 15-16. Forty-four percent of Hispanics live in districts that are majority-Hispanic, while 47% live in districts with a White-majority VAP. *Id.* at 16 Thus, White non-Hispanics, who are 45% of the total population, hold clear majorities in 70% of districts and have opportunities to win 70% of seats, while African-Americans and Hispanics, who are 48% of the State's population, are pluralities or majorities in just 30% of districts. *Id.* at 16-17. This presents a differential opportunity to elect, and it is not explained by having to put more Hispanics into districts to create majority-HCVAP districts. *Id.* at 17. Hispanics of voting age are dispersed into Anglo districts more than Anglos of voting age are dispersed into non-Anglo districts such that nearly three times as many Hispanics

are stranded in districts in which they are the minority. *Id.* at 18-19. As a result, proportionality of representation is lacking statewide. *De Grandy*, 512 U.S. at 1025 (O'Connor, J., concurring) (lack of proportionality is probative evidence of vote dilution and is always relevant).

Regarding the historical background of the plan, Plaintiffs offered expert and lay witness testimony concerning Texas's long history of discrimination with regard to voting and in general. *See also Bush v. Vera*, 517 U.S. 952, 981 (1996) (noting parties' reliance on "Texas' long history of discrimination against minorities in electoral processes, stretching from the Reconstruction to modern times, including violations of the Constitution and of the VRA"). The parties take divergent views of the importance of this factor. Citing *Arlington Heights*, the Fifth Circuit recently noted that "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes," but unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value. *Veasey*, 830 F.3d at 232. Defendants seek to cast most of Texas's history of racial discrimination as ancient history.

The Court finds it unnecessary to rely on evidence of long-past State-sponsored discrimination to find discrimination here. But the Court agrees with the Fourth Circuit in *McCrory* and the Fifth Circuit in *Veasey* that the state's history of race discrimination and violations of the VRA, coupled with other evidence, is relevant to providing context. *Veasey*, 830 F.3d at 232 n.14 ("history (even 'long-ago history') provides context to modern-day events"); *McCrory*, 831 F.3d at 223-24. In this regard, the Court notes the Fifth Circuit recognized that restrictive

and discriminatory voting laws have typically been enacted (by *both* political parties) in response to a perception of increased voting power by emerging demographic groups. *See Veasey*, 830 F.3d at 331 & n.10 (Costa, J., dissenting in part); *see also Veasey*, 830 F.3d at 241 n.30 (noting the testimony of Dr. Burton that every time African-Americans had been perceived to be increasing their ability to vote and participate, there has been State legislation to deny them the vote, dilute the vote, or make it more difficult for them to participate on an equal basis as White voters); TrA532 (Flores) (noting that both Republicans and Democrats have discriminated against minorities because they are unsure of how they will vote and therefore try to control it); TrJ1228 (Thompson) (both Democrats and Republicans have engaged in voting rights violations that had to be remedied in court).

With regard to more recent instances of voting discrimination, the Fifth Circuit stated in *Veasey* that *LULAC v. Perry* does not lend support for a finding of "relatively recent" discrimination because the Court relied on the history of discrimination as a context for the disenfranchisement of voters who had grown disaffected by the Republican incumbent, but "did not base its decision on a conclusion that the legislature intentionally discriminated based upon ethnicity." 830 F.3d at 233. However, this seems to overlook the fact that the Supreme Court noted that Texas's actions "bore the mark of intentional discrimination" even though that was not ultimately its holding. See LULAC, 548 U.S. at 440. The actions that "bore the mark of intentional discrimination" in *LULAC v. Perry* were carried out in 2003 by the Republican-dominated Legislature, and are similar to the

actions Plaintiffs complain were taken in 2011 with regard to CD23 and CD27.

Regarding the sequence of events leading up to the challenged decision, the Texas Legislature enacted its 2011 redistricting plans in the context of strong racial tension and heated debate about Latinos, Spanish-speaking people, undocumented immigration and sanctuary cities, and the contentious voter ID law. Tr810-12 (Turner) (it was a tough session with a lot of tension around voter ID and the early voting absentee bill and their impact on minority voters); TrA262 (Seliger) (the 2011 session involved voter ID, redistricting, and sanctuary cities, which are all "racially charged"); Tr436 (Flores), Joint Expert Ex. E-8 at 6 (the 2011 session was the most racially acrimonious he had seen and it seemed Hispanics and Spanish speakers were targeted); Tr437-38 (Flores) (stating that he observed a video of an individual trying to give testimony in Spanish through an interpreter to the Transportation Committee and one of the Senators interrupted him and said it was insult that he was speaking in Spanish rather than English).

Plaintiffs contend that the process of enacting the map was exclusionary/secretive and was unnecessarily rushed, with little opportunity for public input or meaningful amendments, and that this is further circumstantial evidence of improper motive. Although David Hanna testified that he did not feel the process was particularly or unusually rushed, TrA1557, and Defendants contend that Plaintiffs have not identified an objective standard to determine whether this process was "rushed" (docket no. 1272 at 39-40), the timeline speaks for itself.

Although the interim field hearings may have succeeded in notifying the public about upcoming

redistricting, they were of limited usefulness in terms of obtaining meaningful public input for legislators, and there is little indication that the 82nd Legislature or the mapdrawers paid much attention to the public testimony received at these hearings. No congressional maps were proposed during the regular session. Once Plan C125 was made public, the map essentially passed in sixteen days.

The initial proposal was drawn largely in secret by Downton in consultation with Solomons, Seliger, Doug Davis, Interiano, and Republican congressional and Texas House insiders. Even Senate redistricting committee lawyers were not shown the plan before it was released. D-602 at ECF 126, 140-41. Senator Seliger admitted that no minority member of the Senate was involved in drawing the plan. TrA256-57. Minority members of the house and senate redistricting *committees* were generally shut out of the mapdrawing process. Although mapdrawers obtained and relied on data such as the RPVAs and OAG 10 analyses from the OAG, this data was not shared with minority members of the Legislature or even the redistricting committee.[129]

When Plan C125 was released on May 31, hearings were set on June 2 and June 3, and a new Plan C130 was released before the June 3 hearing. This was a very short

---

[129] Defendants assert that it should come as no surprise that Democrat members did not have influence on the process, given that they were outnumbered two-to-one in the House. Docket no. 1272 at 48. Defendants also argue that Democrats were kept out of the process because they constantly threatened litigation and refused to support the final plan for fear of weakening their litigation position. *Id.* at 45, 48-49. However, if mapdrawers were truly concerned with complying with the VRA and avoiding litigation, an open process would seem more conducive to that end.

preparation time for hearings, which made it difficult for minority groups to organize to review the maps and prepare comments and proposed alternatives. There was no meaningful debate over minority-proposed plans, and few minority-proposed changes were given meaningful consideration or adopted, only those that did not enhance minority ability or increase the number of minority opportunity districts.[130]

"This hurried pace, of course, strongly suggests an attempt to avoid in-depth scrutiny." *McCrory*, 831 F.3d at 228. Although Defendants note that there was no point of order raised and they were operating within the time limits of the special session, "a legislature need not break its own rules to engage in unusual procedures." *Id.* Further, Defendants assert that Plaintiffs cannot gain traction on this factor because they point to no "normal" procedure from which the Legislature departed in passing this bill, *see* docket no. 1272 at 39, to which Plaintiffs respond that there has been no "normal" benchmark procedure to point to that did not involve violations of the VRA.

Defendants contend that the fact that the process was secretive is not evidence of discriminatory intent "because Plaintiffs have not established that the 2011 redistricting process was any more secretive than previous redistricting legislation, or any legislation for that matter." Docket no. 1272 at 46. However, we examine the

---

[130] For example, Defendants argue and the record supports a finding that the Hispanic population of CD20 was increased to bolster its performance at the request of minority legislators, but this was in response to retrogression concerns under § 5 and did not affect the partisan balance of the map.

process to glean insight into whether there was discriminatory purpose, and the inquiry is not limited solely to comparing this process to prior processes for deviations. In this case, the rushed and secretive process suggests that Defendants did want to avoid scrutiny of whether their efforts in fact complied with the VRA or were intended to do so, or whether they were only creating a facade of compliance.[131] Solomons made misleading comments from the floor, such as that he had not seen a congressional map proposal from Congressman Lamar Smith, that CD6 in DFW was a minority coalition district, and that changes were made to CD23 to maintain its performance.[132] A rushed process provided less time for minorities to evaluate the plans or to learn that Smith and other Republican leaders were proposing a minority district in DFW.

Legislators' comments that the short-time frame necessitated such a rushed process, while facially valid, were also pretextual in some regards. Unlike with the House map, there was no impending LRB deadline. The Governor could have called a second or third special session if the map was not passed during the first special session. Though Defendants imply that would have

---

[131] Defendants' argument that "the supposedly inadequate time for public input cannot support a claim of racial discrimination because it affected all members of the public equally" (docket no. 1272 at 41) misunderstands this factor. Plaintiffs are not arguing that the rushed process itself was a discriminatory act; they argue that it is circumstantial evidence of improper motive.

[132] In addition, although Defendants now state that they rejected maps that included a DFW district because it would have been a Democrat district, this was not the reason given for rejecting and moving to table maps during debates.

caused extra delay, they chose to go to the D.C. Court for preclearance, which they knew to be slower, indicating that delay was not their true concern. Extending the process even a few extra days would not have derailed the plan, but might have afforded minorities a more meaningful opportunity to examine proposed maps and engage in actual debate, rather than having all their proposed maps tabled without any meaningful debate.

Although these factors are not dispositive on their own, they provide additional pieces of support concerning motivation. The exclusion of minority member and public input despite the minority population growth, the misleading information, the secrecy and closed process, and the rushed process, all support an inference that steps were taken to undermine minority voting strength to obtain partisan advantage. Combined with the other evidence in this case, the Court finds that Plaintiffs have established that Defendants acted at least in part with a racially discriminatory motive in enacting Plan C185, and with regard to the districts in DFW in particular. Defendants have failed to show that the same lines would have been drawn in DFW or that minorities would not have been packed and cracked without this racial motive.

With regard to effects, packing and cracking is an effective dilution technique that had the intended effect in DFW. Minority votes are wasted in CD30, and elsewhere minorities are kept at levels in which they cannot elect representatives of their choice. The Court has already found that Plaintiffs do not need to satisfy the 50% CVAP requirement, and the Court finds that there is racially

polarized voting in Dallas and Tarrant Counties.[183] Except for the existing African-American district CD30, minorities have been consistently unable to elect candidates of their choice to the United States House in the DFW districts. The Court also heard evidence that Anglo Representatives elected in those districts have been unresponsive to their needs. The record sufficiently demonstrates dilutive effect. Accordingly, the Court finds that the districts in DFW are invalid because they violate § 2 and the Fourteenth Amendment.

III. Houston area claims

Plaintiffs bring § 2 intent and results claims in the Houston area, as well as intentional vote dilution claims under the Fourteenth Amendment. Plaintiffs complain that, despite the minority growth in the area, Plan C185 maintains the same number of minority opportunity districts (three) as the benchmark plan, when an additional minority district could have been drawn. Plaintiffs further argue that the failure to create more minority opportunity was the result of intentional vote dilution in violation of § 2 and the Fourteenth Amendment.

A. Section 2 Results Claims

The benchmark plan C100 had three minority districts in Harris County, one Hispanic and two African-American. CD29 (wholly within Harris County) was a Latino opportunity district (56% HCVAP using 2005-2009

---

[183] Defendants conceded the existence of racially polarized voting in DFW. Dr. Engstrom found racially polarized voting in Dallas and Tarrant Counties. Docket no. 307-1 (Engstrom Corr. Rebuttal Report) at 12-15, 18-21, Tables 5 & 7.

ACS data), and was represented by Gene Green (Anglo, Democrat). CD9 (in Harris and Fort Bend Counties) and CD18 (wholly within Harris County) were considered to be African-American districts that consistently elected minority candidates of choice. CD9 was 38.9% HVAP, 36.3% BVAP, 12.6% Anglo VAP, 48.2% Black alone CVAP, and 48.4% combined BCVAP, and was represented by Al Green (African American, Democrat). CD18 was 39% HVAP, 37.9% BVAP, and 19.3% Anglo VAP, 46.4% Black alone CVAP, and 46.7% combined BCVAP, and has been represented by Sheila Jackson Lee (African American, Democrat) since 1994. Although the African-American districts were not quite at the 50% BCVAP threshold set by mapdrawers for § 2-required opportunity districts, mapdrawers felt these were ability-to-elect districts that had to be maintained under § 5.

All the population growth in the Houston area was attributable to minorities. At the Houston field hearing, many witnesses testified about the minority growth and asked for an additional Latino district to be drawn there. Expert witness Richard Murray noted that the minority growth tended to be in the same areas (eastern half of Fort Bend County and southwest Harris County), and opined that it would be easy to create a second district (in addition to CD29) that would give Latino voters an opportunity to elect while maintaining African-American opportunity districts CD9 and CD18. Joint Expert Ex. E-4 at 27.

Despite the Latino population growth in the Houston area, no new Latino or coalition opportunity district was created there. Defendants contend that a new Latino opportunity district could not be drawn in Harris County without retrogressing the existing Latino district CD29

below 50% HCVAP, and thus no new Latino district was required (and Defendants continue to assert that minority coalition districts are never required by § 2). *See* docket no. 1276 at 81 (proposed FF 741); TrA1593 (Downton); Downton 8-12-11 depo. (Joint Ex. J-62) at 73 (Downton testified that he tried to draw an additional Latino opportunity district in Harris County (using a 50% HCVAP standard), but could not without retrogressing CD29 (reducing its HCVAP below 50% HCVAP)).

Plan C185 retained the two African-American (CD9, CD18) districts and one Latino opportunity district (CD29) from Plan C100, though certain Plaintiffs contend that changes were made to the African-American districts that weaken them in terms of removing economic engines and creating "tension" between Latino and African-American voters in the districts. In Plan C185, CD29 is 56.3% HCVAP (and 16.3% BCVAP) using 2005-2009 ACS data. CD9 is 47.7% combined BCVAP (and 18.3% HCVAP), and CD18 is 48.9% combined BCVAP (and 17.4% HCVAP). A new district, CD36, was added in the area, but it and all the other Houston-area districts are majority-Anglo CVAP and do not provide minority opportunity to elect. TrA1498, TrA1505 (Murray) (new CD36 is an Anglo-dominated, Republican district).

Plaintiffs point to various plans that were submitted during the legislative session and as demonstration maps in this litigation to support their argument that an additional minority district should have been drawn in the Houston/Harris County area, and that the failure to do so resulted in vote dilution. *E.g.*, docket no. 1279 (United States Post-Trial Brief) at 19 n.10 ("Alternative plans created an additional minority opportunity district in

Harris County.")[134]; Tr93-94 (Martinez Fischer) (MALC contends that demonstration plans C163, C164, C187, and C188 all created one additional opportunity district in Houston). Although certain Plaintiffs have issues with the districts as drawn, which are discussed in the context of the claims brought by the African-American Congresspersons, they do not challenge any of the Houston-area minority districts as not being opportunity districts. Rather, their claim is that four minority opportunity districts were required by § 2. Thus, the Court concludes that the rule of *De Grandy* applies, and that Plaintiffs must demonstrate that four compact majority-CVAP districts were required by § 2. *See De Grandy*, 512 U.S. at 1008 ("When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.").

Given this Court's conclusion that Plaintiffs may satisfy *Gingles* through the use of minority coalition districts with a combined minority CVAP over 50%, the

---

[134] The Court notes that the United States' proposed fact finding 241 states that it was possible to create an additional Hispanic opportunity district in Harris County and cites MALC Proposed Plan C211. Docket no. 1278 at 51. But Plan C211 largely retains the Harris County configuration from Plan C185. That same proposed fact finding also cites David Hanna's testimony from the July 2014 House trial (though the cited page number is incorrect), but the Court notes that Hanna testified that it was possible to create another minority district in Harris County in the Texas House plan, not the Congressional plan. TrJ1206-07.

Court must reject Defendants' argument that reducing the HCVAP of CD29 below 50% (when its combined CVAP remains above 50%, converting it from a Latino-majority opportunity district to a coalition district) would be retrogressive and violate § 5 (or would create problems under § 2 in terms of the number of minority-majority-CVAP districts). Creating four opportunity districts instead of three would not be retrogressive, and this is yet another example where Defendants took the most restrictive position on the VRA to avoid creating any new opportunity districts. Further, Defendants improperly focused only on maintaining existing population percentages as the measure of retrogression, and pretextually used their professed compliance with the VRA to avoid creating new minority opportunity districts. Defendants do not seriously assert that they would have been denied preclearance or sued under the VRA for creating *more* minority opportunity districts.[185] Nevertheless, the Court concludes that Plaintiffs have failed to proffer sufficient evidence demonstrating that four compact majority-minority coalition districts were required by § 2.

---

[185] To the extent Defendants would assert that they could not intentionally draw a fourth minority opportunity district without being subject to a possible *Shaw*-type challenge, the Court does not hold today that Defendants were required to draw four minority opportunity districts in Houston. Nor does the Court hold that Defendants had to try to draw four minority opportunity districts. The Court holds only that the VRA did not prevent Defendants from allowing there to be more minority opportunity districts, as Defendants apparently assert by arguing that CD29 HCVAP "retrogression" prevented them from drawing a fourth district.

1. Plan C122 & Plan C123

MALDEF proposed Plan C122 and Plan C123 with a new coalition district in Harris County during the session. D-602 at 77; Joint Map Exs. J-3 & J-4. The four-district configuration in Harris County in these two plans is identical. What had been the southeastern part of CD29 (the Latino district) is replaced with the new CD36, a Latino opportunity district (50.1% HCVAP using 2005-2009 ACS data), and CD29 is shifted westward (keeping one of the two main Hispanic population centers from former CD29) and changed into a coalition district (35.7% HCVAP + 21.4% BCVAP). Using 2005-2009 ACS data, CD9 was 40.7% BCVAP (and 17.3% HCVAP) and CD18 was 42.7% BCVAP (and 14% HCVAP). Downton rejected this plan because it did not propose two HCVAP-majority districts (he acknowledged that CD36 is HCVAP-majority but asserted that CD29 was retrogressed because its HCVAP dropped from above 50% to 35.7%). TrA1593. As noted, the Court finds that was a pretextual basis for rejecting the plan, given that it provided more minority opportunity.

However, the Court finds that Plaintiffs have failed to offer sufficient evidence that four compact minority-majority districts could have been drawn in the Houston area. These proposed districts are bizarrely shaped and little information is given concerning how the districts were drawn and what traditional redistricting principles were applied. While CD18 and CD29 remain wholly within Harris County, they are changed significantly from the benchmark configuration. CD9 is also modified and adds a long appendage into Fort Bend County that splits the cities of Richmond, Rosenberg, and Sugar Land. New

CD36 is not particularly compact, its borders do not respect cities, and it contains a small appendage that juts into Brazoria County to pick up 940 individuals, splitting the city of Brookside Village. Plaintiffs fail to offer sufficient evidence that the minority populations in these four districts are compact, taking into account traditional redistricting principles.

2. Plan C163, Plan C164, and Plan C188

Representative Martinez Fischer proposed Plans C163 and C164 during the session, and the four proposed districts in these maps and MALC demonstration Plan C188 (districts 9, 18, 29, and 36) are almost identical. These plans maintain the general shape and location of existing districts CD18 and CD29. Joint Expert Ex. E-18 (Giberson Report) at 7 (noting that the existing Hispanic-majority district CD29 is essentially maintained in its current form, with both large Hispanic population cores remaining in the district). Although these districts are bizarrely shaped, their configuration is arguably explained by the traditional districting principles of maintaining benchmark configurations and member-constituent relationships. New CD36 is placed to the west, and Giberson noted that it encloses some additional areas of Hispanic population in the western part of Harris County. *Id.* Although Giberson gives compactness scores for CD36 in the plans (10.5/2.1/3.8 for C163 and 10.4/2.1/3.8 for C164), he did not comment on the compactness of the districts other than his general observation that none of the districts he evaluated "are compelling by shape alone." *Id.* at 7-8.

Dr. Arrington found generally that Plan C163 "satisfied traditional redistricting principles" without

specifically analyzing the proposed Harris County districts. TrA410-11. He stated generally that Plan C163 overall "did at least as good a job as the 2011 plan in satisfying traditional districting principles." TrA411. The borders of CD36 appear to respect the boundaries of small cities (by excising them from the district), but the boundaries of CD9 cut Stafford, Missouri City, and Arcola. Further, CD36 is not particularly visually compact and extends a fishtail-shaped protrusion into CD9. While this configuration of districts is an improvement over many other plans, the Court nevertheless must conclude that Plaintiffs have not provided sufficient evidence to satisfy the first *Gingles* precondition at this time. As previously noted, Plaintiffs must provide the Court with evidence to find that, taking into account traditional districting principles such as respecting communities of interest (aside from race), these districts include compact minority populations. Unless and until such evidence is presented, the Court cannot find that Defendants violated § 2 by failing to draw a fourth minority district in the Houston area.

3. Plan C166

Plan C166 is offered by the Rodriguez Plaintiffs as creating an additional Hispanic opportunity district in Harris County. Joint Map. Ex. J-7. CD9 is 40.5% BCVAP and 18.5% HCVAP; CD18 is 44.3% BCVAP and 14.8% HCVAP; CD29 is 38% HCVAP and 21.2% BCVAP, and new CD36 is 45.1% HCVAP and 14.2% BCVAP.[136] This

[136] Ansolabahere testified that CD36 was 45.1% HCVAP using 2005-2009 ACS but that he believed it would be slightly over 50% using updated data. Tr1159. In fact, it is 49.1 (+/- .9)% using 2008-

plan was offered by Representative Dawnna Dukes during the session, but she was not pleased with its Harris County configuration, which was a result of having to create the map in a short time. TrA916 (Dukes).[137]

Dr. Arrington testified that he studied Plan C166 and believed it was possible to create a new minority opportunity district in the Houston area. TrA406-07. Arrington found generally that Plan C166 "satisfied traditional redistricting principles" without specifically analyzing the proposed Harris County districts. TrA410-11. Dr. Ansolabahere testified that Plan C166 created an additional Hispanic opportunity district by moving existing CD29 and adding new CD36 in southeastern Harris County. Tr1157-61. The concept of this map is similar to MALDEF's Plan C122.

2012 ACS data. D-565.5. In any event, its combined B+HCVAP would be well over 50%.

[137] The Harris County districts are almost identical to those proposed during the session by Sen. Gallegos in four-district Plan C127. The NAACP and African-American Congresspersons objected to Plan C166 because, they contend, it "seriously undermines the continuing effectiveness of the Harris County African-American opportunity districts" Docket no. 466 at 5. Gallegos noted that 100% of the growth in Harris County was due to minorities, yet no new minority district was created. D-602 at 175. He stated that his proposed map did not retrogress and that there are a number of ways to draw four effective minority districts in Houston "if there is a will." *Id.* He also proposed Plan C129, but no party seems to be offering that plan (and in any event CD1 is far from compact). Gallegos stated that his proposals included two compact Latino districts with HVAP over 60%, one representing "East Side" communities of interest and one representing "North Side" communities of interest. *Id.* at 176-78. He stated that both districts would provide Latino ability to elect even though their SSVR was below 50%. *Id.*

This plan does not demonstrate that four minority coalition districts were required by § 2 because Plaintiffs again failed to proffer sufficient evidence that the minority communities contained therein are compact. Even if new CD36 could be viewed as reasonably compact based on shape, the other three districts are bizarrely shaped. CD9 contains a long tentacle that reaches far into Fort Bend County and splits small towns. Plaintiffs fail to demonstrate that these districts are compact, taking into account traditional redistricting principles.

4. Plan C168

Plan C168 was offered during the session by Rep. Alvarado (Hispanic, Democrat) to add a second Latino opportunity district in Harris County while maintaining the three existing districts. Rep. Alvarado said both districts CD29 and CD36 are completely in Harris County and have a HVAP over 50%, and though the SSVR was slightly under 50%, "both have proven to elect Latino voters' preferred candidate." D-23 at S7.[138] She stated that CD29 remained anchored in north Houston and "picks up the growing Latino communities of west and southwest Houston, Harris County." *Id.*

---

[138] Solomons opposed the amendment, stating that the map retrogressed CD29 because it dropped the SSVR to 35.5% and its HCVAP to only 38.6%, and the new district was only 42.5% SSVR and 41.1% HCVAP, and that it in effect had one less Latino opportunity district. D-23 at S9-S10. Alvarado responded that they were coalition districts, and Rep. Veasey stated that Solomons was using arbitrary numbers that "are not the gold standard," and that there are other factors that need to be taken into consideration, including that the proposed district would elect the candidate of choice. D-23 at S10.

The four proposed minority districts in this plan are similar to the ones in Plan C122 and C166. And again, other than the fact that they might reach the numerosity threshold by picking up minority areas and will perform for minorities, Plaintiffs failed to offer sufficient evidence that the minority populations are compact for § 2 purposes.

5. Plan C187

MALC contended that this plan created an additional minority opportunity district in Houston. Joint Map Ex. J-9. However, proposed new minority-coalition CD36 is an absurdly long, visually non-compact district, and Plaintiffs failed to proffer sufficient evidence showing that four compact minority-majority districts were required by § 2.

6. Plan C190

The Task Force alleges that there should be a Latino opportunity district and a coalition district in the Houston area, in addition to the existing two African-American districts, as shown in its demonstration plan C190. Docket no. 416 at 4-7; Joint Map Ex. J-11; PL-345 (map). This map suggests a similar configuration to Plan C122, with proposed new CD36 being HCVAP-majority (50.1% HCVAP using 2005-2009 ACS data) and CD29 taking the northern Hispanic population center from former CD29 and moving westward to become a coalition district (35.7% HCVAP, 57.1% H+BCVAP).[139] The African-American

---

[139] As with other plans, Defendants contend that the new Latino district retrogresses CD29 by bringing it from 56% HCVAP and 52.6% SSVR to 35.7% HCVAP and 31% SSVR. Docket no. 411 at 17. The Task Force correctly responds that, by reconfiguring the

districts are 40.7% BCVAP (CD9) and 42.2% BCVAP (CD18). The district locations are also similar to those proposed in Plan C166.

The Task Force says CD29 would be a Latino and African-American coalition district with HCVAP of 35.7%, and that the district provides reasonable opportunity for Latino voters. Docket no. 482 at 73-74 (proposed FF 408-412); docket no. 1274 at 160 (proposed FF 1061). It is wholly contained within Harris County. The Task Force says the district "unites communities with low educational attainment" and "low-income communities" in Harris County. Docket no. 482 at 74-75 (proposed FF 413, 416); docket no. 1274 at 161 (proposed FF 1062, 1065). Further, citing the declaration of Mary Ramos from Houston, the Task Force asserts that CD29 "would combine a largely African American community with a predominantly Latino community into one district" and that the communities joined in CD29 "are largely working class and low income," "share many similarities in terms of the public safety, economic, and educational issues that they face," and "are unified in terms of many of the key issues that voters often look at when choosing who to vote for as an elected official." Docket no. 1274 at 164 (proposed FF 1088); PL-417.

Task Force exhibit PL-364 shows that CD29 joins areas with significant amounts of population 18 years or older who speak Spanish or speak English "not well" or "not at all." The same is true for CD36, though it also

---

existing districts to create one Latino opportunity district (the same number as in the benchmark) as well as an additional coalition district, Plaintiffs increase electoral opportunity and do not diminish it. Docket no. 460 at 15.

includes a large area to the east that includes less than 10% such population. Both districts encompass significant amounts of populations with high percentages of adults age 25 and over without a high school diploma. PL-365. Both districts include a mix of median household incomes, though both include predominantly lower income households. PL-366.

Defendant's expert Todd Giberson noted that historically, CD29 has connected two distinct but proximate centers of Hispanic population, one north of downtown Houston and another to the southeast. Joint Expert Ex. E-18 at 6. He states that in Plan C190 these two centers of Hispanic population are severed to form the core of two separate districts. *Id.* Although he provides compactness scores for CD29 (16.0/2.1/4.0) and CD36 (11.5/1.7/2.6), he makes no comments about compactness. *Id.* At his deposition, Giberson stated that CD36 was "probably not an issue" in terms of compactness, and that his concern was about the splitting of CD29. Giberson depo. (Joint Ex. J-42) at 16. However, he acknowledged that the shape of CD29 could be explained by its working around adjacent African-American opportunity district CD18. *Id.* at 16, 21.

The Task Force also states, "In light of the fact that traditional redistricting criteria support the location of new congressional districts in areas of greatest growth, and racial minorities comprised more than 100% of the increase in Harris County from 2000, it is easily understandable why a new congressional district in this area would be majority-minority, regardless of whether § 2 requires such a district. The State presents no evidence to suggest that a new majority-minority district in Harris County would be an unconstitutional racial gerrymander,

as opposed to the natural result of locating a new congressional district in an area of high population growth." Docket no. 460 at 16. Once again, Plaintiffs appear to shift the burden to Defendants to prove that their proposed districts would violate *Shaw*, when the proper burden is for Plaintiffs to demonstrate that four compact majority-minority CVAP districts could be drawn in the Houston area. While it is true that growth in the Houston area was attributable to minorities and Defendants may have been able to draw an additional non-racially-gerrymandered district there that could have performed for minorities, Plaintiffs fail to demonstrate that their plan includes four compact districts required by § 2. Plaintiffs proffer evidence that the districts meet minority population CVAP thresholds and would perform, and that the populations do have some commonalities other than race, but as with CD6 in Plan C190, they fail to proffer evidence showing that, taking into account traditional districting principles, these four districts represent compact minority populations of sufficient number.

7. Plan C193 & Plan C194

The NAACP and African-American Congresspersons offer plan C193, which contains only the two African-American districts CD9 and CD18, and Plan C194, which adds CD29 and CD36. Their expert Murray opined that a new effective Latino district could be added in Harris County without changing the African-American districts (in fact restoring them from changes made in Plan C185), as shown in Plan C193. Tr1047-49, TrA1431-32; TrA1494; Joint Expert Ex. E-4 at 37; Murray depo. (Joint Ex. J-49) at 98-99.

Fairfax testified that Plan C193 met traditional redistricting criteria and could be adopted by the state. Tr834. He stated that CD9 and CD18 were centered in Harris County. Tr836. They retain their benchmark configuration in general. Fairfax stated that CD9 was a majority-minority district with 49.4% BCVAP and 18% HCVAP, and that it complied with the traditional redistricting criteria he analyzed (equal population, contiguity, compactness, and county splits). Tr836. He testified that CD18 was 49.3% BCVAP and 18.6% HCVAP. Tr837. However, these Plaintiffs fail to proffer sufficient evidence showing that districts 29 or 36 contain compact minority populations—CD36 stretches all the way to the coast, and CD29 expands into Montgomery County. Accordingly, they have failed to demonstrate that four compact minority-majority districts were required.

8. Plan C199

LULAC offers its demonstration Plan C199 (LULAC 12-1-C), a four district plan.[140] Tr742 (Korbel). Korbel stated that the purpose of this plan was to see if a Hispanic opportunity district could be added without affecting the numbers of the current Latino opportunity district CD29. He stated that the proposed new district puts the minority population in Jefferson and Galveston Counties in with the primarily Hispanic minority population in Harris County. He acknowledged that "may seem like a stretch" but that it had been traditionally done in Texas, with those areas instead attached to Anglo-dominated districts. Tr694-95 (Korbel). Korbel stated that Plan C185 ties the

---

[140] The districts are similar to those proposed in LULAC demonstration Plan C197 for Harris County.

minority community in Jefferson County to the minority community in Galveston County and connects them with a sand dune and then joins them to quite a number of Anglos to make an odd-shaped district (CD14) when one could join the minority community of Jefferson County with the minority community in Harris County to create a new minority district. Korbel depo. (Joint Ex. J-46) at 77-78. However, as discussed previously, the fact that populations or areas may have been joined in other districts for unknown reasons or as part of political gerrymandering does not satisfy Plaintiffs' burden of demonstrating that the minority population contained in their proposed district is compact. Further, these districts are not at ideal population. This map fails to show that four compact districts were required by § 2.

9. Summary of § 2 results claims

In sum, Plaintiffs have failed to proffer a demonstration plan accompanied by sufficient evidence to demonstrate that four minority opportunity districts were required by § 2.[141] However, they are not precluded from raising § 2 results claims with regard to Plan C235 during the trial on that plan.

B. Intentional Vote Dilution

Expert witness Murray noted that Harris and Fort Bend Counties added about 920,000 people between 2000 and 2010, and all the growth was minorities, as the two-county Anglo population declined by about 42,000. Joint Expert Ex. E-4 at 27. As noted, he opined that this minority growth and its location (generally southwestern

---

[141] Any other plan not specifically discussed herein suffers from the same lack of proof.

Harris County and the eastern half of Fort Bend County) should make it easy to provide additional minority opportunity in Houston. *Id.*

The Task Force Plaintiffs note that, in 2010, persons of Hispanic origin were 40.8% of the population of Harris County. PL-301 (docket no. 322-5) at ECF 1008. Nearly 80% of the intercensal growth was attributable to persons of Hispanic origin. Joint Expert Ex. E-9 at 5. Non-Hispanic Whites were 33% of the population, and African-Americans were 18.9% of the population of Harris County. PL-301 (docket no. 322-5) at ECF 1008. Despite the fact that minorities were responsible for the growth in the area, and a new district (CD36) was placed partly in Harris County, no new minority district was drawn in the Houston area.

Plaintiffs allege that mapdrawers utilized racial gerrymandering (cracking) to avoid creating a new minority district and to intentionally dilute minority voting strength in the Houston area. *See* docket 1282 (Task Force post-trial brief) at 68 ("In Harris County, where Latinos constituted 79.75% of the growth and the total Latino population exceeds 1.5 million, Texas redistricters created boundaries that prevented the emergence of a new combined opportunity district."); docket no. 1278 at 51 (United States proposed FF 242) ("The 2011 Plan intentionally cracked the Hispanic population of Harris County, dividing 672,362 Hispanics among six Anglo-controlled districts—CD 2, CD 7, CD 8, CD 10, CD 22, and CD 36.").[142] They allege that the

---

[142] It is not clear whether any Plaintiffs assert packing claims against districts in Houston. In 2011, Quesada Plaintiffs alleged that CD18 was packed. Docket no. 409 (Quesada Post-Trial Brief) at 46.

configuration of districts and the failure to create a new minority opportunity district despite the minority population growth is circumstantial evidence of dilutive intent. Docket no. 1282 at 78; docket no. 1278 at 52 (proposed FF 244).

The United States relies on Dr. Arrington's expert opinion that mapdrawers used cracking to prevent the creation of an additional Hispanic district. TrA412; US-352 at 48; US-356 at 11; Rod-906.[143] He notes that there are 672,362 Hispanics divided in six Anglo majority districts, four of which "swoop in" from outside Harris county to grab Hispanic population. TrA412-13 ("There

---

Kousser testified in 2011 regarding his report (Table 24), which asserted that minority districts were packed, and he stated that BHVAP was increased in all ten districts with BHVAP majorities except CD18. Joint Expert Ex. E-2 at 114-116; Tr296-98. Although the Task Force cites Kousser's Report for his opinion that there was packing and cracking statewide (docket no. 1274 at 414, ¶ 541), no party asserts packing as to a particular district in Houston in their post-2014 trial briefs. The Court notes that the BHVAP numbers for Plan C100 in Kousser's report appear to be incorrect, and when correct numbers are used the BHVAP in CD9 decreased from 74.3% to 72.4 and the BHVAP in CD18 decreased from 76.2% to 71.7%, while the BHVAP in CD29 increased only 1% from 82.5% to 83.5%. Further, CD9 actually contains fewer Hispanics (C100 had 310,931 and C185 has 271,030) and African Americans (C100 had 269,443 and C185 has 267,466) and more Anglos (C100 had 76,112 and C185 has 77,211). This is inconsistent with an intent to pack the district. CD18 has fewer Hispanics, more African Americans, and more Anglos. Only CD29 has more Hispanics and African-Americans and fewer Anglos. To the extent any Plaintiffs are asserting packing claims regarding the Houston minority districts, they have failed to support them.

[143] To the extent Defendants have objected to Dr. Arrington's reports on hearsay grounds, the Court notes that it cites these reports only as support for Dr. Arrington's live testimony at trial.

are a number of Anglo-dominated suburban districts which have fingers reaching into Harris County and picking off Hispanic population and, therefore, cracking that population, making it impossible to create an additional district in Harris County."); US-356 at 11. Given that Hispanic majority district CD29 had 525,996 Hispanics in Plan C185, Arrington reasons that 672,362 Hispanics is more than enough to create a second Hispanic district. US-352 at 49. Arrington also notes the bizarre shapes of the districts as evidence of gerrymandering.[144] *Id.*

The NAACP argues that the fracturing of historic and politically active African-American communities was rampant in Harris County, with communities like the Third Ward/MacGregor neighborhood being fractured. Docket no. 1280 at 22; TrA1451-52 (Murray) (Third Ward/MacGregor had been in CD18 and was now split between CD9 and CD18)); Tr1407-09 (Dixon). The NAACP contends, "Across the board, this fracturing was so precise, and so destructive that it can be explained only by an intent to undermine the emerging political power of minority voters." Docket no. 1280 at 22.

The Court finds that some of the evidence that supported a finding of intentional vote dilution in the DFW area applies to the Houston area. Despite the fact that minorities were responsible for the growth, mapdrawers were hostile to the creation of any district in the Houston area that would contain sufficient minority population to allow them to elect candidates of their choice

---

[144] As before, the Court notes that while bizarre shapes are often evidence of gerrymandering, it may be partisan gerrymandering and not necessarily racial gerrymandering.

(because mapdrawers assumed those candidates would be Democrats). Mapdrawers decided that the new map would add only one Democrat seat and three Republican seats, which meant that they would permit only one new minority district. And mapdrawers wanted to limit minority population in the districts at the time of redistricting and for the foreseeable future to minimize their future ability to elect candidates of their choice, which Defendants thought would be Democrats.

Further, the *Arlington Heights* factors, discussed previously, are relevant circumstantial evidence of dilutive intent. Concerning the impact of the plan in Houston specifically, Dr. Ansolabahere noted that Harris County is an example of where Hispanics are disproportionately stranded in Anglo-majority districts. In Plan C185, ten districts take part of Harris County, and seven of those districts draw a majority or plurality of their population from Harris County. Ansolabahere Report (Joint Expert Ex. E-15) at 20. Ansolabahere noted that Harris County is plurality Hispanic (41%) (and there enough Hispanics in Harris County (1.7 million) to populate two and half districts), but only one district based in Harris County is majority-Hispanic (CD29) and none is plurality-Hispanic (two are Black plurality even though Blacks are 19% of the population). Even though Anglos are only 33% of Harris County's population, four of the seven districts (57%) are White-majority. *Id.* at 21, Table 7; Ansolabahere depo. (Joint Ex. J-44) at 83-84. Thus, while Hispanics have the largest population in Harris County, they are distributed in such a way that they have the least representation of all the groups (31% of Hispanics are in plurality or majority-Hispanic districts, while 67% of the Black population is in the two

Black districts, and over 80% of Whites are in majority-White districts). Ansolabahere Report at 21-22.[145] The district lines magnify Anglo representation and shrink Hispanic representation. *Id.*

The Court further notes that the existence of racially polarized voting in the Houston area[146] the lack of minority candidates of choice being elected outside of protected VRA districts, the lingering effects of discrimination that affect voting, and whether the policy underlying the state's action is tenuous[147] are also relevant evidence of intentional vote dilution.

---

[145] In Harris County, African Americans have two districts, which is proportionally more than their share of the population (though one district would be less than their proportional share). Ansolabahere depo. (Joint Ex. J-44) at 122-24. But statewide they have less.

[146] The Court again notes that Defendants conceded the existence of racially polarized voting statewide except for Nueces and Kleberg Counties. In addition, there was ample expert and lay witness testimony concerning the existence of racially polarized voting in the Houston area, including but not limited to: Joint Expert Ex. E-15 (Ansolabahere Report) at 33, Table 5; Tr887 (Murray); Joint Expert Ex. E-2 (Murray report) at 26; Tr1333-51 (Al Green); Tr1080-81 (Lawson); Tr1390-91 (Jefferson); Tr1400 (Gonzalez); Tr1412-14 (Dixon); Tr1521-23 (Jackson Lee).

[147] As noted, Republican leadership continually took the position that in proposed plans creating an additional minority district, CD29 would be "retrogressed" and this would violate the VRA to justify their refusal to consider those plans, when the creation of more minority opportunity districts would not be retrogressive and they could not reasonably believe that they would be denied preclearance or sued under the VRA for creating more minority opportunity. This pretextual assertion furthered Defendants' goal of appearing to diligently comply with the VRA while deliberately minimizing its effectiveness and deliberately limiting minority opportunity.

Nevertheless, the Court must find that Plaintiffs have failed to sufficiently distinguish the role of race and politics in the drawing of district lines in Harris County. There is no dispute that minority communities are cracked; the question is whether such cracking was intentionally race-based and racially discriminatory (as opposed to being the result of partisan gerrymandering), and Plaintiffs have failed to offer sufficient proof that it was. Unlike in DFW, Plaintiffs fail to show race-based packing in minority districts or the intentional splitting of a minority district, and Plaintiffs did not provide evidence of precinct splits that were likely race-based as they did in DFW. Further, although minority neighborhoods like Third Ward/MacGregor were split, the Court does not find sufficient evidence that these splits were intended to dilute minority voters or to harm them—minority communities were simply foreseeable casualties of Downton and other decisionmakers pursuing their partisan ends without consideration for or input from the affected minority communities. And existing Supreme Court precedent on partisan gerrymandering precludes any relief for the harmful effects on minority voters in this case. Accordingly, the Court finds that Plaintiffs have failed to prove entitlement to relief under § 2 or the Fourteenth Amendment for intentional vote dilution in the Houston area.

IV. African-American Congresspersons' claims

Congresspersons Eddie Bernice Johnson, Sheila Jackson Lee, and Al Green allege Equal Protection Clause claims based on the claim that the African-American districts were drawn in a way the undermines the ability of African-Americans to effectively participate

in the political process in those areas. Specifically, they complain that mapdrawers unnecessarily split communities of interest, removed important areas from existing districts, and undermined the effective and long-term voter coalition (by creating tension between African-American and Latino voters) in these areas. However, the Court finds that Plaintiffs failed to establish an intent to discriminate based on race in the drawing of the African-American Congresspersons' districts. Rather, the changes to the district were the effects of partisan gerrymandering and the lack of input from Democrat members.

The evidence indicates that Congresswoman Johnson's home was mistakenly drawn out of her district, and mapdrawers were not aware of the error until after the plan was enacted. To the extent specific "economic engines" or district offices were removed, Plaintiffs failed to prove that these areas were knowingly or intentionally removed from the specific districts with an intent to harm or discriminate, and the evidence shows that Anglo members also lost economic engines and district offices. With regard to the potential for tension among racial groups within the districts, the Court finds that Plaintiffs failed to prove that this tension was purposefully created or intentionally discriminatory. Rather, the evidence shows that mapdrawers were concerned with racial population percentages and district performance of these districts for § 5 retrogression purposes, but gave little to no thought about how the different minority populations might interact within the district longterm.

SUMMARY

Plaintiffs have established a § 2 violation, both in terms of intent and effect, in South/West Texas. Plaintiffs have shown that seven compact majority-HCVAP districts could and should be drawn there that would substantially address the § 2 rights of Hispanic voters in South/West Texas, including Nueces County. Defendants' decision to place Nueces County Hispanic voters in an Anglo district had the effect and was intended to dilute their opportunity to elect their candidate of choice. Meanwhile, race predominated in the drawing of CD35, and Defendants' decision to place majority-HCVAP CD35 in Travis County was not to comply with the VRA but to minimize the number of Democrat districts in the plan overall. Plaintiffs have established a *Shaw*-type equal protection violation with regard to CD35. Plaintiffs also establish a *Shaw*-type equal protection violation with regard to CD23. In addition, Defendants' manipulation of Latino voter turnout and cohesion in CD23 denied Latino voters equal opportunity and had the intent and effect of diluting Latino voter opportunity. Nueces County Hispanics and Hispanic voters in CD23 have proved their § 2 results and intentional vote dilution claims. The configurations of CD23, CD27, and CD35 in Plan C185 are therefore invalid.

Plaintiffs fail to proffer a demonstration plan accompanied by sufficient evidence to demonstrate that additional compact minority districts could be drawn in DFW or Houston, taking into account traditional redistricting principles and communities of interest. However, they are not precluded from raising § 2 results

claims with regard to Plan C235 during the trial on that plan.

Plaintiffs have proved intentional vote dilution through packing and cracking in DFW and also establish a *Shaw*-type racial gerrymandering claim with regard to CD26, but not CD6. However, they fail to prove intentional vote dilution in the Houston area, and fail to prove that mapdrawers acted with racially discriminatory purpose when drawing the districts represented by the African-American Congresspersons.

SIGNED on this 2nd day of May, 2017.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

/s/
ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

JERRY E. SMITH, Circuit Judge, dissenting:

I respectfully dissent.

First, we no longer have Article III jurisdiction, because, under recent, binding Fifth Circuit caselaw, the case is moot, so we have a constitutional duty to dismiss. Second, although this court should not be issuing an advisory opinion on a matter that is moot, I dissent on the merits, assuming arguendo that the matter is not moot, insofar as the majority finds violations, with the exception of the majority's treatment of DFW, as to which I agree with the result and largely with the reasoning. The

majority's findings of violations in other districts are insufficiently supported in the record under applicable law.

The majority's massive product, including its opinion and its findings and conclusions, is commendable, to say the least. I trust that the attorneys and litigants appreciate the efforts of my two colleagues and their staffs. Though I disagree with a good number of their ultimate conclusions, no one can reasonably question the integrity and dedication that underlie each statement and every decision. The majority's detailed recitation of the record is remarkable in its detail. It is evenhanded, thorough, and fair. It will permit the Supreme Court, on direct appeal, the opportunity to know every nuance of the case in the unlikely event that that Court concludes that the matter is not moot.

There is good news and bad news from the fact that the majority has tackled this colossal task with such proficiency. The good news is that, as I have already said, the reviewing court—as well as the public and, perhaps ultimately the legislature—has the advantage of a full record and a complete explication of the majority's conclusions. The bad news is that that project has taken about 2½ years to complete, measured from the end of trial in August 2014.

No one can reasonably criticize the delay. Some of the parties have made repeated but polite inquiries and have filed motions reminding the court of the need for expeditious resolution in light of the statutory schedule for the 2018 elections. I can appreciate the litigants' and attorneys' frustration that these proceedings have pended for almost six years. But assuming that this panel needed to wade through the huge record and caselaw to announce

a result (beyond a declaration of mootness), the time it spent was absolutely necessary. We explained that in a carefully detailed order entered January 5, 2017, denying the January 2 "Amended Non U.S. Plaintiffs' Joint Motion for Entry of Judgment":

This case involves a voluminous record. As movants acknowledge within this motion, "The litigants in this cause have had two trials totaling hundreds of hours of testimony and thousands of pages of exhibits and evidence. All pending issues have been briefed extensively." In terms of the record alone, this case includes: over 1300 docket entries, including pleadings, lengthy post-trial briefs, reply briefs, supplemental briefs, proposed fact findings, proposed conclusions of law, argument summaries, and Powerpoint presentations from each of the parties in this case (the post-trial briefs and proposed fact findings and conclusions of law from just two of the many parties—Plaintiff Latino Redistricting Task Force and Intervenor United States—total over 1,000 pages); over 10,000 pages of transcripts (including 6,850 pages of transcripts from the trials in this case, not including the interim plan proceedings or any other hearings, thirteen agreed lay witness depositions entered into evidence totaling almost 1,800 pages, and twelve agreed expert witness depositions entered into evidence totaling almost 1,400 pages); approximately 3,000 exhibits, many of which are hundreds of pages long and include numerous lengthy reports, supplemental reports, and rebuttal reports from the twenty-one expert witnesses in this case; as well as numerous disputed proposed deposition excerpts and offers of proof. The relevant case law contains too many pages to count. The Court continues to diligently work through this

voluminous record and the complex legal questions presented in this case and will issue an opinion as soon as possible.

Back to the bad news: Although the delay in respect to an examination of the complex merits issues is understandable, the delay in rendering a dispositive, final, and appealable judgment is not. Once *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015), was announced two years ago, reversing the decision of this panel, and more certainly after the Supreme Court denied certiorari in November 2015, mootness was obvious. And no one disputes that a federal district court has the constitutional duty to examine possible want of jurisdiction, including mootness, *sua sponte* if necessary.[1]

But no *sua sponte* examination was even needed: In early May 2015, the state alerted this court to *Davis* with unmistakable precision:

> [In *Davis* the Fifth Circuit] made clear that "after Texas repealed the 2011 plan, . . . the case became moot and eliminated the district's jurisdiction over the remaining issues in the lawsuit." [*Davis*, 781 F.3d] at 220. In light of this new, binding authority on mootness from the Fifth Circuit, the State Defendants respectfully submit that the Plaintiffs' claims in this case were also mooted by the repeal of the challenged 2011 redistricting plans.

---

[1] The majority's assertion that "it was Defendants' burden to prove mootness" is misleading. Every federal court has the undeniable duty to assure itself, on a continuing basis, that it has jurisdiction. So any preliminary pronouncements that this panel may have made concerning mootness must be corrected if we no longer have jurisdiction.

> (Because the United States did not file its complaint until after the challenged plans were repealed, it did not present a live case or controversy to begin with.) It follows from *Davis v. Abbott* that the plaintiffs' claims became moot before final judgment; they should therefore be dismissed for lack of subject-matter jurisdiction. At the very least, *Davis* implies that the Plaintiffs' claims are moot if they challenge districts that were, like Senate District 10, modified by the Court and later adopted in modified form by the Legislature.

(Ellipses in original, citations omitted.) The United States, as intervenor, filed a three-page response in mid-May 2015.[2]

In the interest of expediency, and as directed by the Fifth Circuit in a related case that is in all relevant respects identical, the panel should have agreed to issue a judgment of dismissal for mootness no later than late 2015, after certiorari had been denied. That would have provided ample time for a direct appeal to the Supreme Court, which long ago would have rendered a judgment on mootness.

Although misguided, the majority's decision is somewhat understandable if not downright commendable in showing dedication to the task at hand. A bare dismissal for mootness would have incensed the parties aggrieved by it, and if the dismissal had ultimately stood, all the efforts that culminated in the August 2014 trial on the

---

[2] Other plaintiffs separately indicated that they joined in that response.

2011 Congressional plan would have been seen as wasted. The panel would have been maligned for "punting" on a significant segment of the Texas decennial redistricting litigation. Moreover—and speaking charitably—my distinguished colleagues may have been reasonably influenced by the "sunk cost fallacy," defined as "continu[ing] a[n] endeavor as a result of previously invested resources (time, money or effort)."[3]

But we are where we are. I will examine, in detail why this matter is moot. Then, with great respect, I will show why significant parts of the majority's legal analysis are infected with clear error.

I. Mootness deprives this court of jurisdiction

A.

The state correctly contended, long ago, that this matter is moot as mandated by *Davis*, a Fifth Circuit decision by which we are bound. Because we are without jurisdiction in the absence of an Article III case or

---

[3] "Sunk cost fallacy," https://www.behavioraleconomics.com/mini-encyclopedia-of-be/sunk-cost-fallacy/. The concept results from "bias resulting from an ongoing commitment . . . . [A] person may have a $20 ticket to a concert and then drive for hours through a blizzard, just because [he or she] feels that [he or she] has to attend due to having made the initial investment. If the costs outweigh the benefits, the extra costs incurred (inconvenience, time or even money) are held in a different mental account than the one associated with the ticket transaction." (Citing H.R. Arkes and C. Blumer, "The Psychology of Sunk Costs," *Organizational Behavior and Human Decision Processes* 35, 124-40 (1985); R.H. Thaler, "Mental Accounting Matters," *J. of Behavioral Decision Making* 12, 183-206 (1999).

controversy, the only thing we are empowered to do is to dismiss with prejudice.[4]

It is worthwhile to review the proceedings. The plans at issue (the "2011 plans") were adopted in 2011—six years ago. This three-judge panel of the district court enjoined the implementation of those plans, also in 2011, also six years ago. We twice drew interim maps to be used for 2012, two election cycles ago. While the case was ongoing, Texas also sought preclearance under Section 5 of the Voting Rights Act ("VRA") for these same plans in the U.S. District Court for the District of Columbia. In August 2012, 4½ years ago, a three-judge panel of that court denied preclearance. *See Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013).

The next events happened quickly and were ably and concisely summarized in *Davis*:

> First, while Texas's appeal of the preclearance denial was still pending in the Supreme Court, the Texas Legislature repealed the 2011 plan and adopted the district court's interim plan (Plan S172) without change. This prompted Plaintiffs to ask the Supreme Court to dismiss as moot Texas's appeal of the D.C. court's preclearance denial on June 24, 2013. The next day, on June 25, 2013, the Supreme Court decided *Shelby County, Alabama v. Holder*, – U.S. – , 133 S. Ct. 2612 (2013), finding

---

[4] Lest the reader think that this would terminate the Texas redistricting litigation stemming from the 2010 decennial census, a dismissal for mootness would apply only to the 2011 plans, leaving (as the majority acknowledges) the task of litigating the 2013 plans to a conclusion.

> unconstitutional Section 4(b) of the Voting Rights Act—the section containing the coverage formula that automatically required Texas to seek Section 5 preclearance. Although the Court reaffirmed the validity of Section 2 and "issue[d] no holding on [Section] 5 itself," the Court held that Section 4(b)'s coverage formula could "no longer be used" because it was based on outdated data. *Id.* at 2619, 2630-31. The day after *Shelby County* came down, on June 26, 2013, then-Governor Rick Perry signed the bill repealing the 2011 plan, adopting the new Senate plan (that is, the district court's interim plan), and making the plan immediately effective. Finally, on June 27, 2013, the Supreme Court vacated the D.C. district court's judgment denying preclearance of Texas's 2011 plan and remanded the case for further consideration in light of Shelby County and possible mootness. *See Texas*, 133 S. Ct. 2885.

Davis, 781 F.3d at 211-12.

In June 2013, nearly four years ago, Texas repealed the 2011 plans and adopted the second set of interim maps that we had, by then, drawn. Those are the plans that remain in effect today and were used for the 2014 and 2016 election cycles; we have yet to hold a trial on their merit.

In other words, this case concerns maps originally adopted six years ago, and which have not even threatened to be in effect in the past four years. They were never used in an election. Indeed, three elections cycles—2012, 2014, and 2016—have occurred since the putative adoption of the 2011 plans, and in none were the

2011 plans utilized. In these circumstances, it is no surprise that the specter of mootness loomed large.

Nevertheless, when confronted with mootness, we rejected the state's position that claims involving the 2011 plans should be dismissed. *See Perez v. Texas*, 970 F. Supp. 2d 593, 601-03 (W.D. Tex. 2013). We concluded that this fell into the "voluntary cessation" exception to general mootness law, *id.*, and thus that plaintiffs' claims under the never-used, since-superseded plans should survive.

Circumstances dispositively changed when the Fifth Circuit unanimously reversed this panel's decision. Specifically, in *Davis*, the Fifth Circuit ruled, in essence, that claims involving the 2011 Texas Senate plan were moot. We cannot ignore a decision from this circuit that is so unequivocally directed at the enactments that resulted from the 2011 legislative redistricting. Any controversy regarding those enactments is moot, depriving us of jurisdiction.

B.

A precedential decision by a circuit court binds all district courts in the circuit. That command is absolute. Even if this panel would have applied the law differently if it had seen the issue *de novo*—indeed, even if we had previously decided precisely the same issue in precisely the opposite way—we still must follow the dictates of the circuit once it issues a new decision.[5]

---

[5] *See, e.g., United States v. Hernandez*, 580 F.2d 188, 189-91 (5th Cir. 1978); *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 720 F. Supp. 2d 800, 805 (W.D. Tex. 2010); *Jett Racing & Sales, Inc. v. Transamerica Commercial Fin. Corp.*, 892 F. Supp. 161, 163 (S.D. Tex. 1995).

Every district court has the task to determine under what circumstances it is, or is not, bound by circuit precedent. The key distinction is between holdings and dicta. In this circuit, courts "are bound by not only the result but also those portions of the opinion necessary to the result."[6] "A statement is not dictum if it is necessary to the result or constitutes an explication of the governing rules of law."[7] These rules apply to both circuit panels and district courts within the circuit.[8] By contrast, "[a] statement is dictum if it 'could have been deleted without seriously impairing the analytical foundations of the holding' and 'being peripheral, may not have received the full and careful consideration of the court that uttered it.'"[9] So, the test is straightforward: The result of the case, as well as all the reasoning necessary to it, is holding and cannot be disregarded by this district court or by subsequent circuit court panels.

Now to apply these principles to *Davis*. Recall that *Davis* dealt with a challenge specifically to the 2011 State Senate redistricting plans, *see Davis*, 781 F.3d at 209, while the case before us concerns the State House and Congressional plans. After the legislature's decision to repeal and replace all of the 2011 plans, both the plaintiffs and the defendants in *Davis* agreed that the 2011 claims

---

[6] *Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000) (internal quotation marks omitted).

[7] *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004).

[8] *See, e.g.*, *Hill v. Hom/Ade Foods, Inc.*, 136 F. Supp. 2d 605, 609 (W.D. La. 2000) (citing cases).

[9] *Int'l Truck*, 372 F.3d at 721 (quoting *Gochicoa*, 238 F.3d at 286 n.11).

had, by then, been rendered moot,[10] *id.* at 212, and this three-judge panel entered an order dismissing them, as explained in *Davis*, *id.* at 212-13. As the majority accurately says, *Davis* was not a dispute about mootness, since both sides were in agreement on that; instead, the question was whether the plaintiffs who were challenging the 2011 Senate plan were prevailing parties within the meaning of 42 U.S.C. § 19731(e), thus entitling them to attorneys' fees. That depended on whether they had received any judicially sanctioned relief on the merits of their claims. *Id.* at 213-14.

The plaintiffs in *Davis* brought Section 2, Section 5, and malapportionment claims. With regard to Section 5 and malapportionment, Texas argued that the plaintiffs could not have been prevailing parties because the decision in *Shelby County* rendered the initial decision to enjoin the 2011 Senate plans unconstitutional. *Id.* at 215. The *Davis* panel, consisting of Chief Judge Carl Stewart and Judges Edith Jones and Steven Higginson, unanimously disagreed. They stated flatly that "Texas had *already mooted the entire lawsuit*" by adopting the 2013 interim plan, and thus that the state had waived its opportunity to raise that claim. *Id.* (emphasis added). "In other words, when Texas raised this argument, the district court no longer had jurisdiction to entertain it." *Id.*[11]

---

[10] Subject to certain exceptions not relevant here.

[11] For support, the panel cited *National Rifle Ass'n of America, Inc. v. McCraw*, 719 F.3d 338, 344 (5th Cir. 2013), which specifically noted that "[i]f a claim is moot . . . a court has no constitutional jurisdiction to resolve the issues it presents."

So, *Davis* held that Texas could not raise its argument based on *Shelby County* because it had been waived, and the waiver was conditioned on the declaration that the case had been mooted.[12] This easily satisfies *Gochicoa*'s requirement, 238 F.3d at 286 n.11, that courts be bound "not only [by] the result but also those portions of the opinion necessary to the result." *Sans* the mootness determination, the claims would not have been waived, and *sans* waiver, the *Davis* panel would have had to examine Texas's claims regarding *Shelby County*.

With regard to Section 2, *Davis* held that the mootness of the claims prevented the plaintiffs from becoming prevailing parties. The plaintiffs maintained, to the contrary, that this district court's interim order enjoining the implementation of the 2011 Senate plan sufficed to render them prevailing parties. *Davis*, 781 F.3d at 218. The Davis panel rejected plaintiffs' argument; it noted that Texas did indeed adopt the relief mandated by this district court's orders when the legislature enacted the interim plan but that this was not judicially sanctioned relief. *Id.* at 218-19. To the contrary, the fact that Texas adopted the plans of its own accord mooted the plaintiffs' claims, rendering them unable to secure judicially sanctioned relief. *Id.* Without the mootness, the plaintiffs would have been able to claim that the relief was judicially sanctioned. But because Texas's adoption of the interim plans rendered judicial sanction of them superfluous, the plaintiffs could not prevail.

---

[12] *See Davis*, 781 F.3d at 215 (noting that "once a district court no longer has jurisdiction to resolve the plaintiffs' claims on the merits, the defendant cannot continue to collaterally litigate against those claims").

Finally, Texas itself requested vacatur of our three-judge district court's two interim orders. *Id.* at 220. The *Davis* panel rejected that as well, and again based its decision on mootness. Texas "believe[d] that *Shelby County* compelled the district court to vacate both of [those] orders." *Id.* But it did not ask the court for that vacatur; instead, it "repealed the 2011 plan and adopted the district court's interim plan in its place, thus *mooting* Plaintiffs' lawsuit." *Id.* (emphasis added). "[I]t was only later, after Texas repealed the 2011 plan, that the case became moot and eliminated the district court's jurisdiction over the remaining issues in the lawsuit." *Id.* Texas could have sought vacatur at the district court level but did not, instead repealing the 2011 plan and mooting the case. By doing so, it could not seek vacatur on appeal. Again, mootness comprised a "portion[] of the opinion necessary to the result." *Gochicoa*, 238 F.3d at 286 n.11. The majority makes no effort to dispute that, nor can it.

To summarize: In *Davis*, mootness comprised a vital—indeed irreplaceable—portion of the reasoning of the decision on the plaintiffs' Section 2, Section 5, and malapportionment claims and the defendant's request for vacatur. None of those statements regarding mootness "could have been deleted without seriously impairing the analytical foundations of the holding." *Int'l Truck*, 372 F.3d at 721 (internal quotation marks omitted). They are thus part of the holding, not *dicta*, and must be followed in all legally indistinguishable cases. *See Hernandez*, 580 F.2d at 189-90.

And this case is nothing if not legally indistinguishable from *Davis*; the only differences are that *Davis* dealt with the State Senate, while we address the State House and Congress, and that the plaintiffs here have refused—by

their silence—to accede to the commonsense proposition that their claims are moot. Under *Davis*, we are bound to dismiss.

C.

The United States urges, essentially, that *Davis* changes nothing and that the governing Fifth Circuit decisions on mootness, which based lack of mootness on voluntary cessation and the continued availability of other remedies, remain correct. These are wan justifications, and though the panel majority accepts them, its logic is faulty, to say the least.

The obvious flaw with the voluntary-cessation argument is that that theory was equally available in *Davis*, yet the *Davis* panel declared the matter moot. *Davis* involved the same claims and nearly the same parties,[13] was in the same procedural posture, and examined the same potentially mooting measures taken by the state. If the case had not been moot—that is, if the voluntary-cessation exception had applied—the Davis panel's various mootness-related holdings would have been invalid. Put another way, *Davis*'s implicit rejection of voluntary cessation as grounds for rejecting mootness was "necessary to the result." *Int'l Truck*, 372 F.3d at 721.

Certainly the *Davis* panel was on firm ground in concluding that. "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case," but "[t]he case may nevertheless be moot if the defendant can demonstrate that there is no

---

[13] There is significant overlap between the plaintiffs in Davis and the plaintiffs here, and the defendant state officials are the same.

reasonable expectation that the wrong will be repeated."[14] The Fifth Circuit has repeatedly held that "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed."[15] In *Save Our Aquifer v. City of San Antonio*, 108 F. App'x 863 (5th Cir. 2004), the court found that Section 2 and Section 5 claims against a voting ordinance were moot once the ordinance had been repealed.

There is no reason to suspect that the legislature would even entertain the notion of reenacting 2011 plans if we were to find this case moot—nothing beyond raw conjecture, which is not enough.[16] Indeed, Texas has already conducted three elections under the 2013 plans, and it is unrealistic to think that the state would choose to scrap all that and throw its electoral system into uncertainty immediately upon a finding of mootness by

---

[14] *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (internal quotation marks omitted).

[15] *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004).

[16] *See id.* at 849 n.3; *see also, e.g., Cnty. of Morris v. Nationalist Movement*, 273 F.3d 527, 534 n.4 (3d Cir. 2001); *AT&T Commc'ns of Sw., Inc. v. City of Austin*, 235 F.3d 241, 243 (5th Cir. 2000); *Robinson v. Kimbrough*, 520 F.2d 1264, 1265 (5th Cir. 1976) (per curiam); *Parrish v. Board of Com'rs of Ala. State Bar*, 533 F.2d 942, 946 (5th Cir. 1976); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644-45 (6th Cir. 1997); *Wisc. Right to Life v. Schober*, 366 F.3d 485, 491 (7th Cir. 2004); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994); *Jones v. Tremmer*, 57 F.3d 921, 923 (10th Cir. 1995); *Troiano v. Supervisor of Elections in Palm Beach Cnty., Fla.*, 382 F.3d 1276, 1283 n.4 (11th Cir. 2004); *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997); 13C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3533.6 ("Repeal—even repeal by implication—likewise moots attacks on a statute." (footnote omitted)).

this court. The mere possibility of such a legislative do-over is emphatically not the "virtual certainty" that circuit courts have demanded.[17] Even if *Davis* had not already removed voluntary cessation from the equation, it would not be a viable theory on which to base the notion that there is still an Article III case or controversy.

The second distinction that the United States proffers between this case and *Davis* (and the prime factor relied on by the majority) is that the plaintiffs in *Davis*, contra the plaintiffs here, never pursued Section 3(c). To begin, Section 3(c) remedies are premised on "violations of the fourteenth or fifteenth amendment." 52 U.S.C: § 10302(c). So, the potential availability of Section 3(c) remedies cannot keep the other remedies here—which are all statutory, not constitutional, claims—on life support. Helpfully, the majority at least admits that "the remedied § 2 results claims are moot."

Even beyond that, the Fifth Circuit in *McCorvey*, 385 F.3d at 849, made absolute that "[s]uits regarding the constitutionality of statutes become moot when the statue is repealed." Any Section 3(c) claims question the constitutionality of the plans, given that they are premised on putative violations of the Fourteenth and Fifteenth Amendments, and by the Fifth Circuit's precedent they are moot based on the statute's repeal.

---

[17] *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1165-67 (9th Cir. 2011). The majority's insinuation that "there is no indication that the Legislature would not engage in the same conduct . . . in upcoming redistricting cycles" finds no support in the majority's exhaustive review of the record and, moreover, requires the State to prove a negative. Even more importantly, the majority does not even attempt to show—because it cannot—"virtual certainty."

Once the 2011 plan was repealed, the case was dead. Any assertion now of Section 3(c) relief cannot retroactively resurrect it.

As a final point, permitting the Section 3(c) claims to proceed here would ultimately be fruitless; plaintiffs have no hope of winning. Their principal claim is based on intentional voter dilution, which is a Fourteenth Amendment violation. Under Fifth Circuit precedent, plaintiffs must prove that "the purpose [of the challenged law] and the operative effect of such purpose . . . is to dilute the voting strength of [the protected class]."[18] A vote-dilution claim has two elements: "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[19]

Plaintiffs cannot show both. No 2011 district that was reconfigured in 2013 ever had, or ever could have, any effect on any voter, so plaintiffs cannot establish intentional vote dilution under the Fourteenth Amendment. The 2011 plans were never used for any election; they never had any effect on anyone beyond precipitating this lawsuit. It is a logical impossibility for a plan that never went into effect for any election, and never will be used for any purpose, to be a "violation," in the words of Section 3(c), or to have had an "actual

---

[18] *Voter Info. Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 212 (5th Cir. 1980).

[19] *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion); *see also, e.g., Lucas v. Townsend*, 967 F.2d 549, 551 (11th Cir. 1992) (per curiam); *Backus v. South Carolina*, 857 F. Supp. 2d 553, 567 (D.S.C.), *aff'd mem.*, 133 S. Ct. 156 (2012); *White v. Alabama*, 867 F. Supp. 1571, 1574 (M.D. Ala. 1994); *NAACP v. Austin*, 857 F. Supp. 560, 572 (E.D. Mich. 1994) (three-judge panel).

discriminatory effect." *Bandemer*, 478 U.S. at 127.[20] The 2011 plans were never implemented and will never be used; in circumstances such as these, no plaintiff can show actual injury.

The majority ignores these facts. Instead, it posits that if we dismiss this suit, the resulting confinement of discussion of intent to the 2013 plans "would significantly impact the intent analysis for Plaintiffs' intentional vote dilution claims given the involvement of a different legislature and Defendants' assertion that they could have not such discriminatory intent by simply adopting the Court's interim plans." The majority opines that "[p]laintiffs should not have to jump through additional hoops to prove that the 2011 mapdrawers' intent carried forward to the 2013 legislature." In other words, even without jurisdiction, this court should charge ahead to "decide" the 2011 claims by issuing what would necessarily be an advisory opinion.

That notion is profoundly flawed. Article III contains no exception (nor has any court ever found one) that allows us to resurrect dead claims in order to make it easier for plaintiffs to pursue live ones. If the Constitution requires plaintiffs to jump through hoops to prove their claims in this important litigation, then they will just have to do that.

---

[20] This is not a controversial proposition; there are myriad cases reciting the maxim that a plaintiff cannot show injury for a law that has never been, and can never be, applied to him. *See, e.g., Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1183-84 (10th Cir. 2000) (holding that claims against a repealed law were mooted because future enforcement was impossible and prosecutions for past violations were hypothetical); *Lux v. White*, 99 F. App'x 490, 491-92 (4th Cir. 1994) (per curiam) (same).

But even if (by some theory) making things easier for the plaintiffs were an acceptable reason to evade Article III, the endeavor would, in the end, be pointless. As I have shown, plaintiffs must prove both discriminatory intent and discriminatory effect, *Bandemer*, 478 U.S. at 127, and these plaintiffs can never prove any effect from the 2011 plans. Allowing plaintiffs to proceed further down the garden path of a successful Section 3(c) claim before slamming the door shut on them only confers false hope, requires the State to expend more time and effort for no reason, and delays a final resolution. Giving someone a shovel and telling him to dig a hole to China is just as pointless as telling him to do it with his bare hands.

To sum up: Six years later, we are still enveloped in litigation over plans that have never been used and will never be implemented. That second fact—that these plans will not trouble any voter—has been pellucidly clear for at least four years. In addition, we confront a Fifth Circuit case—undeniably binding on this panel—that concludes, as a necessary part of its reasoning, that a case identical in all relevant respects to this one was moot.

The majority insists we press on with granting relief to plaintiffs who have never been, and cannot be, injured by the 2011 plans. This busy panel majority's dedication to exploring the voluminous legal and factual issues is commendable, but we are prohibited from issuing advisory opinions and from ruling where there is no Article III case or controversy. Instead, we should move on to review the 2013 plans and, as to the 2011 maps, accept the Fifth Circuit's mandate—in a decision that reversed this very panel in this very redistricting controversy—instead of trying to keep the case on life support.

II. Summary of the merits

I have commended the majority for its detailed examination of the merits. For two reasons, I will not try to duplicate that detail. First, it would further delay these proceedings, and on balance, that would be unwise in the interest of justice. Second, even assuming that lengthy dissents are read, there are aspects of the majority opinion that miss the forest for the trees. There are some general themes that decide this case as to the respective geographical areas in dispute. I will explore those in due course.

In summary, the majority holds that the plaintiffs have established a Section 2 violation, in intent and effect, for what we are calling "South/West Texas," primarily dealing with CD23, CD27, and CD35. That is clear error. The majority declares that race predominated in the drawing of CD35 and that there is a *Shaw*-type equal-protection violation regarding CD23 and CD35. That likewise is clearly erroneous. The plaintiffs are entitled to no remedy with respect to those three congressional districts.

The majority holds that the plaintiffs have failed to proffer a sufficient demonstration plan for additional compact minority districts in the Dallas/Fort Worth area ("DFW"). That is true.

The majority declares that the plaintiffs have proven intentional vote dilution through packing and cracking in DFW (including, largely, CD30) and have established a *Shaw*-type racial gerrymandering claim for CD 26 but not CD6. I concur in each of those sound recitations.

The majority rules that there is a failure of proof of intentional vote dilution or a racially discriminatory

purpose for districts in the Houston area in respect to the districts represented by the African-American Congresspersons. That is a correct finding.

III. What this case is really about

This case is really about only whether the congressional lines in the challenged districts were drawn for racial or partisan purposes. That is complicated, and the two considerations often overlap. With the exception of DFW, I agree with the State's assertion that the plaintiffs and the United States have utterly failed "to prove that the 2011 Texas Legislature enacted [the challenged plans] for the purpose of diluting minority voting strength rather than protecting incumbents and preserving Republican political strength won in the 2010 elections."

As mentioned above, I disagree with the panel majority's conclusions that race, instead of partisan advantage, drove the decisions made in CD23, in Nueces County and throughout CD27, and in the Austin/San Antonio IH35 corridor affecting primarily CD25 and CD35. As to all those areas, a careful examination of the record in light of the applicable law reveals that, as the State maintains, the goal was to achieve the maximum number of Republican seats in the 36-member Congressional delegation by allotting three of the new seats to Republicans and one to a Democrat. The heavily Republican legislature (in both houses) was determined to protect the Hispanic Republican incumbent in the most closely contested race (CD23), to redraw a safe Republican district (new CD27) in order to reinforce the surprise win by an Anglo Republican incumbent, and to do whatever it took, within the law, to defeat its perceived

bête noir, the outspoken and successful Anglo Democrat, Lloyd Doggett, including creating a new district predictably able to elect an Hispanic Democrat.

For understandable reasons, the majority relegates to a short footnote the brand new and highly significant decision in *Bethune-Hill v. Virginia State Board of Elections*, No. 15-680, 2017 U.S. LEXIS 1568 (U.S. Mar. 1, 2017). I had hoped that the respective parties would be asked to furnish supplemental briefs on this new case, but that would have delayed this matter to some extent. One might easily dismiss *Bethune-Hill* as case- and fact-specific, especially given that the Court summarized by saying that its "holding . . . is controlled by precedent" and that "[t]he Court reaffirms the basic racial predominance analysis explained in *Miller* and *Shaw II*, and the basic narrow tailoring analysis explained in Alabama."[21] But even if *Bethune-Hill* is read as announcing no new law, it sets forth a necessary overview (which the majority fails to mention) of the current Supreme Court's take on redistricting.

The Court reminds us that race is not invisible and that "the legislature always is aware of race when it draws district lines." *Id.* at *16. The key question (as the majority properly acknowledges) is whether "race was the predominant factor" in placing voters into or out of a district." *Id.* (citing *Johnson*, 515 U.S. at 916). But what does the Court mean by "predominant factor"? The Court explains that the reason for drawing the district must be

---

[21] *See Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

"race for its own sake." *Id.* at *18 (quoting *Johnson*, 515 U.S. at 515); *id.* at *20.

Probing further, what does the Court mean by "race for its own sake"? To answer that, the Court returns to *Shaw II*: The test for race as the "predominant factor," and thus for "race for its own sake," is whether "[r]ace was the criterion that, in the State's view, could not be compromised." *Id.* at *19 (quoting *Shaw II*, 517 U.S. at 907). That can only mean that to satisfy the test, a plaintiff must show that the state acted, in regard to a given voter or group of voters, on the ground that the voter's race was significant in and of itself and not for some other, non-invidious reason.

And importantly: In *Bethune-Hill* the Court goes out of its way to emphasize that examination of legislative lines is at the macro, not micro, level. "[T]he basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Id.* at *23. This means that "[a] holistic approach is necessary." *Id.* at *24. A court's ultimate inquiry must be into "the legislature's predominant motive for the design of the district as a whole . . .; any explanation for a particular portion of the lines, moreover, must take account of the districtwide context." *Id.*

Also as relevant to the case at hand, *Bethune-Hill* addresses the dilemma that legislators face when trying to achieve legitimate goals in redistricting while still complying with the VRA and especially now-inapplicable Section 5. The test is not whether using race was eventually shown to be "actually necessary" but, instead, only whether the legislature had "good reasons to believe" that it must use race. *Id.* at *26 (quoting *Alabama*, 135 S. Ct. at 1274). Under the facts of *Bethune-Hill*, the Court

concluded that state officials, "charged with the sensitive duty of reapportioning legislative districts," "had a strong basis in evidence to believe a 55% BVAP floor was required to avoid retrogression" under Section 5. *Id.* at *28.

In addition to *Bethune-Hill*, the other Supreme Court decision that needs more deference than the majority affords it is *Easley v. Cromartie*, 532 U.S. 234 (2001), to which the majority gives scant attention and dismissively declares, in a footnote, to be "distinguishable." In *Cromartie*, the Court reminds us that the "ultimate" decision is whether "the legislature's motive was predominantly racial, not political." *Id.* at 241. "Caution is especially appropriate . . . where the State has articulated a legitimate political explanation . . ., and the voting population is one in which race and political affiliation are highly correlated." *Id.* at 242. "A legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be *political rather than racial*." *Id.* at 245 (emphasis added).

Also importantly, the Court in *Cromartie* rejected a contention that using a precinct split and "placing the more heavily African-American segment" into a district was impermissible. *Id.* at 248. The Court found no infirmity in the fact that "the legislature drew boundaries that, in general, placed more-reliably Democratic voters inside the district, while placing less-reliable Democratic voters outside the district." *Id.* at 252. That statement can logically be applied to voters who are more "reliable" because of a higher history of turnout.

In *Cromartie*, the Court reversed, as clearly erroneous, the three-judge district court's finding that racial considerations predominated. As the Supreme Court explained, it reversed "because race in this case correlates closely with political behavior. The basic question is whether the legislature drew [the] boundaries because of race rather than because of political behavior (coupled with traditional, nonracial districting considerations)." *Id.* at 257. Racial considerations were not "dominant and controlling." *Id.*

IV. Applying the law to the facts

Texas redistricting in 2011 was essentially about politics, not race. All sides concede that—whether it is a good thing or not—Texas has a strong correlation between race and party. As the majority states, "93 of the 101 Republican members of the House in 2011 were Anglo, while only 8 of the 49 Democrat members were Anglo." It naturally follows that actions taken to disadvantage Democrats will disproportionately affect non-Anglo voters, regardless of the intent. It falls to the courts to decide whether those decisions were directed at "race for its own sake."

The record amply demonstrates that the Congressional redistricting (as well as that for the State House) was designed for the sole purpose of maximizing the number of Republicans to increase political power. That primarily meant protecting Republican incumbents irrespective of their race or the race of their constituents.

That is true, for example, in the perennially litigated CD23. The State drew CD23 for purely permissible partisan political reasons and to comply with the VRA: to make it a district with a reliable HCVAP majority

(increased from 58.4% to 58.5%, which the State saw as an Hispanic opportunity district) and to give the best chance of reelection to newly elected incumbent, Hispanic Republican Quico Canseco, who had been the surprise winner in 2010.

The majority makes no effort to show—because it cannot, under this record—that "[r]ace was the criterion that . . . could not be compromised" or that the district was a "race-based decision."[22] The testimony of expert Theodore Arrington showed that the precincts moved into CD23 had higher levels of Republican performance than those that were removed.[23] Protection of incumbents is one of the most often recognized traditional redistricting principles. The majority's findings, including that "race was the predominant motive" and that "[t]here was both discriminatory motive and improper use of race," are clearly erroneous.

The same is eminently true of CD27. Blake Farenthold, an Anglo Republican, was another surprise winner in the 2010 Republican sweep. The Republican legislature set out to protect him. In addition, the legislature pursued the racially neutral goal of placing the Port of Corpus Christi in a separate district from the competing Port of Brownsville so that each of those districts would have a major city/port as its anchor. In its

---

[22] *Bethune-Hill*, 2017 U.S. LEXIS 1568, at *19.

[23] The winners in CD23 undermine the stereotype that Republicans are Anglo and Democrats are not. As the majority points out, in recent terms the seat has been filled by Conseco (elected in 2010) and by African-American Republican Will Hurd (elected in 2014 and 2016). Curiously, the majority labels Hurd only as "a non-Latino," thus masking the fact that he is in the rare category of African-American Republican.

interim order, this court found no violation as to CD27, and nothing has changed that should alter that sound decision. The majority's change of heart, now finding "intentional vote dilution," is clearly erroneous.

The situation for Travis County, affecting mainly CD25 and CD35, is, to put it mildly, unique. No one will dispute that the Republican majority in the legislature viewed Travis County as the most liberal of the sizeable counties in Texas, also wielding disproportionate influence as the seat of state government and the University of Texas. As the State boldly acknowledges, "The Legislature reconfigured CD 25 to ensure that Democrats in Travis County, including Anglo Democrats, did not maintain their ability to elect a member of Congress."

Purely as a political matter, the Republicans saw opportunity for a "twofer": fragmenting Travis County into relatively harmless parts, rather than a unified political force, and, by the same fragmentation, defeating Congressman Doggett, an Anglo Democrat, by placing his house in heavily Republican CD25.[24] Or maybe even a "threefer": creating a Latino opportunity district in Travis County and the San Antonio/Austin I-35 corridor. It is fanciful to contend that that decision—whether or not wise in terms of public policy or fairness—was one as to which race was "the legislature's predominant motive for

---

[24] "He is one of the most liberal white Democrats from a Southern district, and one of the most liberal congressmen ever to represent Texas in Congress. He has been described as a strong voice for his party on taxes and environmental policies and as a 'muscular progressive.'" Wikipedia, Lloyd Doggett, https://en.wikipedia.org/wiki/Lloyd_Doggett (quoting "Sober Look at the Depth Chart Intensifies for House Democrats," *Roll Call* (Feb. 2, 2014).

the design of the district as a whole." *Bethune-Hill*, 2017 U.S. LEXIS 1568, at *24. The question is "whether the legislature drew District [35's] boundaries because of race rather than because of political behavior (coupled with traditional, nonracial districting principles)." *Cromartie*, 532 U.S. at 257.

An attempt to dislodge an incumbent political adversary should logically be viewed as a permissible redistricting principle, as is true for the traditional principle of protecting an incumbent. It only stands to reason that if a partisan political majority can exercise its legislative weight to protect its friends, it can do that to punish its enemies for political, non-racial reasons.[25] The main point still is that by no stretch of the imagination can what happened to Travis County and Congressman Doggett be chalked up to racial motive.[26] In its interim order, this panel found no likelihood of success for the *Shaw*-type claims for CD35. The majority now finds, to the contrary, that "race pre-dominated in the drawing of CD35." Nothing has changed, and the same result should obtain now as then. The majority's revised finding is clearly erroneous.

In stark contrast to Travis County and CD35 is the DFW (Dallas/Fort Worth/Arlington) Metroplex. Relatively little about the 2011 Congressional

---

[25] In *LULAC v. Perry*, 548 U.S. 399 (2006), the Court rejected a challenge to the dismantling of CD24 that was effected to defeat incumbent Anglo Democrat Martin Frost.

[26] As it turned out, Doggett, the incumbent in CD25, won re-election running in the newly-created CD35, promising to move if elected. (The Constitution requires a Member of Congress to live in the state but not in his or her district.

redistricting passes the smell test as to DFW, the largest metropolitan area in Texas with 6.4 million residents in 2010 but where the apparent choice of minority voters in 2010 was reflected only in CD30 (veteran African-American Democrat Congresswoman Eddie Bernice Johnson). Naturally, the law requires that we conduct much more than a smell test, and the majority goes well beyond that to show, in detail, vote dilution by "packing and cracking" and a *Shaw*-type violation with regard to CD12 and CD26 and to find no violation for CD6.

In terms of what redistricting law requires, the differences between DFW and Travis County/CD35 are dramatic, and, with all due respect, I hope the majority will revisit the latter. The goal and the methods for Travis County/CD35 were so overwhelmingly and purely partisan and political that, even if the peculiarities of Travis County are viewed as *sui generis*, in no respect can it reasonably be said that the breakup of the county and the creation of CD35 were for "race for its own sake."[27]

Then look at DFW: Minority voters moved into CD30 without substantial explanation. And disparate Latino communities in Fort Worth joined together without demonstrated reason, and unusual appendages added to CD26 from an adjoining, but demographically dissimilar, neighboring county. As the majority properly says, "we have admissions from the mapdrawer that he used race as the sole criteria for assigning a significant portion of voters into and out of CD26, and that his sole basis for regarding them as a community of interest was their race, given that he had no familiarity with the area" (citing *Johnson*, 515 U.S. at 911-12). That looks more like race

---

[27] *Bethune-Hill*, 2017 U.S. LEXIS 156, at *18.

for the sake of race. By way of stark contrast, the districts drawn in Travis County and the I-35 corridor do not.

And last, there is the Houston area. I agree with the panel majority that the plaintiffs did not offer sufficient proof of the first *Gingles* factor, so the Section 2 claims premised on coalition districts fail. And the claims of the African-American Congresspersons—two in the Houston area and one in Dallas—are properly seen as unsuccessful.

Regarding Houston-area districts, the plaintiffs desperately tried to find examples of racial slights, but those presentations were especially unimpressive. They quibbled about loss of, or swaps concerning, "economic engines," which are generally recognized as prestigious for any Member of Congress and often provide a good source for fundraising. One expert went so far as to contend that the Astrodome/NRG Stadium complex (home of the Houston Texans NFL team and the Houston Livestock Show and Rodeo and, *inter alia*, the site of the 2017 Super Bowl and the 2016 NCAA Men's Basketball Final Four competition) was not a meaningful economic engine for purposes of redistricting. The plaintiffs complained of Congress Members' loss of district headquarters, though the proof showed that statewide, as well as in the Houston area, many more Republican than Democrat members lost their headquarters. And the plaintiffs bemoaned the swap of some important economic engines between and among the Democrat Congress Members representing the Houston area, though in every case, any loss of significant economic engines was replaced with approximate equal value. One African-American member complained of the incursion of Latinos into his district and was concerned that, in a large

undeveloped tract added to his district, housing might be built that would be populated mainly by higher-income persons (presumably meaning Anglos).

V. The United States as intervenor

I have saved the worst for last, ending unfortunately on a sour note (as many dissents do). I make a needed observation on the behavior of the United States and compare it with the performance of the other plaintiffs and the State. In short, the United States should not have been permitted to intervene in the first place.[28] That was wholly unnecessary, and its presence has negatively infected these proceedings.

The various plaintiffs and plaintiffs' groups were, and are, magnificently represented by talented counsel, most of whom have appeared in Texas redistricting litigation through the decades, usually with notable success. They are candid and fair with the court and opposing counsel. As officers of the court, they strike the proper balance between zealous advocacy and professionalism. They generally refrain from taking completely meritless positions, and their briefs and courtroom presentations reflect an advocate's colorable reading of the law, so they have credibility. They take setbacks and frustrations in stride. Their experts—usually also veterans of Texas redistricting cases past and present—are well versed in the facts of Texas geography and demographics. They meet the court's often rigid scheduling and briefing demands with alacrity and cooperation. In short, they

---

[28] I dissented from the majority's decision to grant the motion to intervene. I will not repeat those reasons, which were *ex ante*. The majority judges on this panel bear no responsibility for the behavior of the United States, which I review *ex post*.

represent their clients well but, at the same time, assist the court in deciding the issues. The same has been, and is, true of the State defendants, ably represented by attorneys from the Office of the Attorney General. Though badly outnumbered, they likewise have aided this court with their skillful advocacy and honest but spirited presentations. They have cooperated with opposing counsel by, for example, refraining from weak objections to evidence and testimony and have conceded points, where appropriate, as officers of the court. Though for the most part they are relatively new to Texas redistricting (at least as compared to plaintiffs' counsel), they exude a thorough knowledge of the law and facts. The State is as blessed to be represented by their attorneys as the plaintiffs are by theirs.

And then there is the United States, appearing through attorneys from the Department of Justice. I have no criticism of their knowledge of the law, and their zeal is, to say the least, more than adequate. But they entered these proceedings with arrogance and condescension. One of the Department's lawyers even exhibited her contempt for Texas and its representatives and her disdain for these proceedings by regularly rolling her eyes at State witnesses' answers that she did not like, and she amused herself by chewing gum while court was in session.

It was obvious, from the start, that the DoJ attorneys viewed state officials and the legislative majority and their staffs as a bunch of backwoods hayseed bigots who bemoan the abolition of the poll tax and pine for the days of literacy tests and lynchings. And the DoJ lawyers saw themselves as an expeditionary landing party arriving here, just in time, to rescue the state from oppression, obviously presuming that plaintiffs' counsel were not up

to the task. The Department of Justice moreover views Texas redistricting litigation as the potential grand prize and lusts for the day when it can reimpose preclearance via Section 3(c).

Of course, these are just personal impressions based on demeanor and attitude. More objectively verifiable are the witch hunts and fishing expeditions that the DoJ conducted in pursuit of its goals. I give two examples.

First is the DoJ's vicious attack on Clare Dyer, a dedicated career employee of the Texas Legislative Council who has served both Democratic and Republican legislatures. She was a key witness on several aspects of the redistricting process. The DoJ accused Ms. Dyer and the mapdrawers of intentionally removing the house of Congresswoman Johnson from her district, CD30. That was an attempt to show blatant and intentional racial discrimination by targeting the only minority member of the DFW Congressional delegation and one of only three African-American Texas Congress Members.

It was nothing short of bizarre for the DoJ to think that Ms. Dyer, the redistricting staff, and the Republican legislative leaders would—at one and the same time—both pack African-American voters into Congresswoman Johnson's district and remove her from it. Members of Congress are not required to live in their respective districts, and the line that was accidentally drawn placed Congresswoman Johnson barely outside the district. No one can doubt that, especially given the packing into CD30, she would have easily won reelection anyway. So it defies common sense that legislative leaders and staff would have taken an action that would be seen as openly discriminatory on the basis of race, with no possible political gain.

But the DoJ was desperate to find some evidence of overt racism to lay the foundation for a Section 3(c) remedy. It wasted substantial time at trial looking for the smoking gun by its mean-spirited questioning of Ms. Dyer and other witnesses, certain that they were guilty of rampant bias.

As it turns out, the error was purely accidental and resulted not from any intent or mistake by Ms. Dyer, but only from the fact that Congresswoman Johnson's house had inadvertently been shown using a 2009 census block instead of a 2010 census block. The majority appropriately finds that "[t]here is no evidence that mapdrawers became aware during the redistricting process that they had not included Johnson's home in her district or that anyone asked them to remedy the problem before the map was adopted."

Another example of a Department of Justice witch hunt, in its frustrated attempt to find evidence of intentional discrimination to support an ultimate claim for Section 3(c) opt-in relief,[29] was its unsuccessful fishing expedition to uncover a smoking gun regarding what occurred on Monday and early Tuesday, June 13 and 14, 2011. As the majority opinion aptly shows in detailing the minute-by-minute communications from very early morning to late at night, those were critical days for finalizing maps for the 2011 redistricting.

The DoJ was determined to uncover racially-tinged communications (perhaps shopping for firehoses on the

---

[29] I acknowledge that the DoJ is not the only party mentioning Section 3(c) relief and attempting to develop proof to support it. My focus, however, is on the DoJ's obvious main purpose for intervention and its behavior in presenting its theories.

Internet?) to prove that the ultimate maps were based on "race for its own sake." Because it was inadequately prepared, the DoJ called witness after witness, and presented document after document, to try to confect a paper trail from which the court could infer bigotry. The State accurately recounts the record as follows:

> After three years and multiple opportunities for discovery, DOJ can offer nothing more than a string of question-begging assertions to connect Eric Opiela's 'nudge factor' e-mail to the Legislature's redistricting plans. There is still no evidence that Eric Opiela developed the "useful metric" he proposed in November 2010, no evidence that any person used his metric to draw districts in 2011, and no evidence that any person who worked on the 2011 plans considered turnout data or used any other race-based method to achieve partisan goals.

The DoJ wholly failed, but not for lack of trying. There was, and is, no smoking gun in this record, nor has the United States shown that the State hid or failed to disclose one. The DoJ's scheme to build a record on which to urge opt-in relief via Section 3(c) has initially failed. Of course, if this court is deemed to have jurisdiction, the judges will consider any remaining claims pressed by any party, including Section 3(c) claims, as appropriate.

The Department of Justice has overplayed its hand and, in the process, has lost credibility. The wound is self-inflicted. The grand theory on which its intervention was mainly based—that invidious racial motives infect and predominate in the drawing of the 2011 district lines—has crashed and burned.

I respectfully dissent from the refusal to dismiss for want of jurisdiction.

/s/
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

APPENDIX D

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
RICK PERRY, ET AL.	§	

ORDER

On February 28, 2012, this Court issued PLAN C235 as the interim plan for the districts used to elect members in 2012 from Texas to the United States House of Representatives. This interim map is not a final ruling on the merits of any claims asserted by the Plaintiffs in this case or any of the other cases consolidated with this case. Nor is it intended to be a ruling on the merits of any claim asserted in the case pending in the United States District Court for the District of Columbia. Rather, this interim map is a result of preliminary determinations regarding the merits of the § 2 and constitutional claims presented in this case, and application of the "not insubstantial" standard for the § 5 claims, as required by the Supreme Court's decision in *Perry v. Perez*, 565 U.S. __, 132 S. Ct. 934 (2012) (per curiam).

Both the § 2 and Fourteenth Amendment claims presented in this case involve difficult and unsettled legal issues as well as numerous factual disputes. It is

especially difficult to determine whether a claim has a likelihood of success when the law is unsettled, as many areas of § 2 law are. Further, both the trial of these complex issues and the Court's analysis have been necessarily expedited and curtailed, rendering such a standard even more difficult to apply. The Court has attempted to apply the standards set forth in *Perry v. Perez*, but emphasizes that it has been able to make only preliminary conclusions that may be revised upon full analysis.

The Court heard extensive testimony concerning the need to have the primaries as soon as possible, and the resulting need for the Court to produce an interim map with sufficient time to allow officials to implement the map. Some Plaintiffs and Intervenors presented a compromise plan – C226 – that would allow the primaries to proceed on May 29 and not require split primaries (thus avoiding significant costs to the counties). Defendants indicated that they have no objection to the Court's issuing an order directing that plan C226 be used on an interim basis for the 2012 elections. The Court finds that adoption of the compromise plan, if consistent with the standards set forth in *Perry v. Perez*, would significantly benefit the voters, candidates, election administrators, counties, and political parties. Because the Court's independent analysis of the plan indicates that it complies with the standards set forth in *Perry v. Perez*, the Court accepts the compromise plan, modified for purely technical reasons as discussed in Part III.A, as the interim plan.

I. Factual and Procedural Background

A. Congressional Redistricting in Texas

The decennial census was conducted last year, pursuant to Article I, § 2 of the United States Constitution. The 2010 census data showed that the population of Texas had increased from the 2000 population of 20,851,820 to 25,145,561, an increase of about 20.6%.[1] It is undisputed that minority population growth, especially in the Hispanic community, accounted for much of the population increase.[2] The population changes mean that the current congressional districts are malapportioned and in violation of the one-person, one-vote principle,[3] and the population increase entitles the State of Texas to four additional seats in the United States House of Representatives. Thus, the State of Texas undertook redistricting efforts to reapportion seats. *See* U.S. CONST. ART. I, § 2.

S.B. 4, the proposed congressional plan, was first made public on May 31, 2011. A hearing was held on June 3, 2011. S.B. 4 passed the Texas Senate on June 6, and passed the Texas House on June 15. S.B. 4 was reported to the Senate as amended on June 16, and reported enrolled on June 20. S.B. 4 was sent to Governor Rick

---

[1] http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf

[2] A comparison of 2000 and 2010 census data shows that the number of persons of Hispanic or Latino ethnicity increased by 2,791,255, accounting for 65% of the total population growth of 4,293,741.

[3] *See Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (the constitutional guarantee of one person, one vote requires congressional districts to achieve population equality "as nearly as is practicable") (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)).

Perry on June 24. Governor Perry signed the bill into law on July 18, 2011. The State's enacted plan drew one new minority opportunity district – Congressional District ("CD") 35 – along the I-35 corridor between Travis County and Bexar County, but drew no other additional minority opportunity districts.[4]

B. Proceedings in this Court

Numerous Plaintiffs and Intervenors filed suit in this Court, asserting constitutional and statutory challenges against the State's enacted map. Plaintiffs assert that the State failed to draw additional required minority opportunity districts in the Dallas-Fort Worth metroplex ("DFW"), the Houston area, and West/South Texas, despite the substantial minority population growth there and satisfaction of the requirements for drawing such districts under § 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973. Section 2 of the VRA requires the State to draw a minority opportunity district if the Plaintiffs demonstrate that the requirements of *Thornburg v. Gingles*, 478 U.S. 30 (1986), are satisfied. *Gingles* requires Plaintiffs to demonstrate: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is politically cohesive; (3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate; and (4) if the first three requirements are shown, that, considering the totality of

---

[4] CD 34 appears to be a "new" minority opportunity district, but it is a replacement for CD 27, which is no longer a minority district.

circumstances, the minority group has less opportunity than whites to participate in the political process and to elect representatives of its choice.

Plaintiffs allege that the State racially gerrymandered districts to avoid drawing new minority opportunity districts and to intentionally disadvantage minority voters. Plaintiffs further complain that the State intentionally weakened CD 23, a minority opportunity district, to protect a Republican incumbent who was not the minority candidate of choice, and that the new configuration of CD 27 and the South Texas area dilutes Hispanic voting strength throughout South, West, and Central Texas in violation of § 2 and the Fourteenth Amendment. In addition, the Rodriguez Plaintiffs complain that the enacted map intentionally dismantled a functioning "tri-ethnic coalition" district (CD 25) in Travis County in violation of the Fourteenth Amendment.

Plaintiffs further challenge and seek to enjoin implementation of the State's enacted plan under § 5 of the VRA because it has not received preclearance. It is undisputed that Texas, as a jurisdiction with a history of racial discrimination in voting, is subject to the preclearance requirements of § 5 of the VRA, as amended and codified at 42 U.S.C. § 1973c.[5] A legislatively enacted

---

[5] As the Supreme Court observed in its recent opinion concerning prior redistricting efforts in Texas, "The District Court recognized 'the long history of discrimination against Latinos and Blacks in Texas,' and other courts have elaborated on this history with respect to electoral processes:

> "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in

plan that has not received preclearance cannot be implemented.

C. D.C. Court Preclearance Proceedings – Summary Judgment

The State chose to obtain the preclearance required by § 5 by filing a lawsuit on July 19, 2011, and that suit is currently pending before a three-judge court in the United States District Court for the District of Columbia (hereinafter "the D.C. Court").[6] In that lawsuit, the State of Texas, as Plaintiff, has asked the D.C. Court to declare that the enacted plan complies with § 5 and that it may be implemented.[7] Section 5 provides that any voting qualification, standard, practice, or procedure (which includes redistricting) "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or [membership in a language minority group], to elect their preferred candidates of choice denies or abridges the

---

> the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods are an unfortunate part of this State's minority voting rights history. The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act. Since Texas became a covered jurisdiction, the Department of Justice has frequently interposed objections against the State and its subdivisions.'"

LULAC v. Perry, 548 U.S. 399, 439-40 (2006) (citations omitted).

[6] *State of Texas v. United States of America & Eric Holder*, Civ. A. No. 1:11-CV-1303 (D.D.C.). Filings in the D.C. Court are noted as "D.C. docket no. __."

[7] D.C. docket no. 1 (Original Complaint) at ¶ 48.

right to vote . . . ." *Id.* § 1973c(b). The statute further explains that the term "purpose" shall include "any discriminatory purpose," and that the purpose of subsection (b) "is to protect the ability of such citizens to elect their preferred candidates of choice." *Id.* §§ 1973c(c), (d).

The United States and several Intervenors (collectively "the Defendants" in the D.C. proceedings) filed answers challenging the congressional plan, asserting that it is retrogressive in effect and was enacted with a discriminatory purpose in violation of § 5.

The State moved for summary judgment on its preclearance request on September 14, 2011.[8] After receiving briefing and hearing oral argument, the D.C. Court denied the motion for summary judgment on November 8, 2011.[9] The D.C. Court issued a memorandum opinion on December 22, 2011 explaining its denial of summary judgment.[10] In the memorandum opinion, the D.C. Court did not make rulings with regard to specific aspects of the State's plan. Rather, it discussed the applicable standards under § 5, including that the State has the burden of proof to show that the planned change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or [membership in a language minority group.]" 42 U.S.C. § 1973c(a).

To determine whether a redistricting plan has the effect of diminishing the ability to elect minority-

---

[8] D.C. docket no. 41 (Motion for Summary Judgment).

[9] D.C. docket no. 106 (Order on State's Motion for Summary Judgment).

[10] D.C. docket no. 115 (Memorandum Opinion).

preferred candidates (*i.e.*, a retrogressive effect), a court compares the enacted plan with a benchmark plan, which in this case is the redistricting plan currently in effect (plan C100, referred to herein as the "benchmark plan"). The D.C. Court held that the proper comparison is the minority group's *ability to elect* under the benchmark and enacted plans. The D.C. Court rejected Texas's position that the standard for determining retrogressive effect should include an evaluation of voting population demographics alone. Rather, it concluded, the inquiry is a functional one that involves numerous factors. Under this functional analysis, questions remained concerning which districts could be considered ability districts. Because Texas used the wrong standard, the D.C. Court concluded, there were material facts in dispute about which districts are minority ability districts, and the D.C. Court was unable to determine on the summary judgment record whether the enacted plan would have a retrogressive effect.

In addition to the claim of statewide retrogression, the retrogressive effects dispute focused primarily on Districts 23 and 25. The performance of CD 23 in electing minority candidates of choice was diminished in the enacted plan, and the parties disputed its status as an ability district. The Gonzales Intervenors argued that CD 25 was a crossover ability district[11] in the benchmark plan,

---

[11] The Supreme Court has defined a "crossover district" as "one in which minority voters make up less than a majority of the voting-age population" but "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009).

and that it must be factored into the retrogressive effect analysis. The D.C. Court agreed that, as a legal matter, coalition[12] and crossover districts provide minority groups the ability to elect a preferred candidate and must be recognized as ability districts in a § 5 analysis, but that there "must be discrete data, by way of election returns, to confirm the existence of a voting coalition's electoral power."[13]

The D.C. Court further held that, to determine whether a redistricting plan has a discriminatory purpose, courts should utilize the framework in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which asks whether invidious discriminatory purpose was a motivating factor in the government body's decisionmaking. The D.C. Court concluded that Texas's failure to account for the significant increase of the Hispanic population did not establish a retrogressive effect, but is relevant to the evaluation of whether the congressional plan was enacted with a discriminatory purpose. The Court stated that it is "significant circumstantial evidence that the plan was enacted with the purpose of denying or abridging [the minority] community's right to vote."[14] The D.C. Court did not discuss the discriminatory purpose standard with regard to any particular district or area of the enacted plan, but concluded that Texas failed to demonstrate that the plan

---

[12] A coalition district is a district in which two separate minority groups form a coalition to elect the candidate of the coalition's choice. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009).

[13] D.C. docket no. 115 at 36.

[14] D.C. docket no. 115 at 40.

as a whole did not have the purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

D. This Court's November 26, 2011 map

In light of the fact that the enacted map had not yet gained preclearance and considering well-settled Supreme Court precedent providing that a legislative plan that has not obtained § 5 preclearance cannot be effective as law,[15] this Court sought to defer to the portions of the Legislature's plan that were unchallenged but otherwise to draw a plan that maintained the status quo so as not to interfere with the pending preclearance proceedings or put into effect a plan that might be denied preclearance. Following these guidelines, a majority of this Court issued a map on November 26, 2011. The State appealed, and the Supreme Court granted review. On January 20, 2012, the Supreme Court set forth new standards for the Court to follow given the procedural posture of the case.

E. *Perry v. Perez*

In *Perry v. Perez*, the Supreme Court stated for the first time what standards should apply when a preclearance decision is pending at the time an interim map must be drawn. The Supreme Court held that, in

---

[15] *See Clark v. Roemer*, 500 U.S. 653, 646 (1991) (failure to obtain either judicial or administrative preclearance renders the voting change unenforceable); *see also Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) ("A new reapportionment plan enacted by a State . . . will not be considered 'effective as law' until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure.") (citations omitted).

drafting an interim plan, this Court "should take guidance from the State's recently enacted plan" to the extent the legislative policies underlying the plan do not lead to violations of the Constitution or the VRA. *Perez*, 132 S. Ct. at 941. The enacted plan "serves as a starting point" and "reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." *Id.* At the same time, however, this Court must "take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* Thus, where, as here, the State's plan "faces challenges under the Constitution or § 2 of the Voting Rights Act, a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Id.* at 942.

With regard to the pending preclearance proceedings and § 5 challenges, the Supreme Court noted that the calculus "is somewhat different" because only the D.C. Court may determine whether the state plan complies with § 5 and other courts "may not address the merits of § 5 challenges." *Id.* This Court "must therefore be careful not to prejudge the merits of the preclearance proceedings" and "should presume neither that a State's effort to preclear its plan will succeed nor that it will fail." *Id.* "The need to avoid prejudging the merits of preclearance is satisfied by taking guidance from a State's policy judgments unless they reflect aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance." *Id.* And by "reasonable probability" the Supreme Court meant in this context "that the § 5 challenge is not insubstantial." *Id.* The Supreme Court noted that this "standard ensures that a district court is

not deprived of important guidance provided by a state plan due to § 5 challenges that have no reasonable probability of success but still respects the jurisdiction and prerogative of those responsible for the preclearance determination." *Id.*

II. Section 5 claims - Discussion

A. "Not insubstantial"

As explained above, although the D.C. Court has exclusive jurisdiction over the merits of the § 5 challenges to the congressional plan, under the Supreme Court's newly announced standard for this interim plan, this Court must determine whether the claims asserted by the Defendants in the D.C. Court are "not insubstantial." In explaining this standard, the Supreme Court stated that it required a finding "that the relevant aspects of the state plan [stand] a reasonable probability of failing to gain § 5 preclearance" and that the Court should follow legislative policies as set forth in the enacted plan where the § 5 challenges "have no reasonable probability of success." *Perez*, 132 S. Ct. at 942.

The parties dispute how to apply this standard in light of the circumstances of this case.[16] The parties dispute who has the burden of proof, given that the State maintains the burden of proof to obtain preclearance in

---

[16] Intervenor Congressman Joe Barton and a number of Plaintiffs urged the Court to await a preclearance decision rather than attempting to apply the "not insubstantial" standard. Docket nos. 621, 644. However, the fact that the Supreme Court provided a standard for the Court to apply before a preclearance ruling is made by the D.C. Court indicates that the Supreme Court did not intend for this Court to await a preclearance decision.

the § 5 case. Texas argues that even though it has the burden of proof under § 5 in the D.C. Court, Plaintiffs should have the burden of proof for purposes of the interim plan because they are seeking to justify changes to the enacted plan.[17] Plaintiffs argue that, consistent with its burden in the D.C. Court to prove that the enacted plan does not violate § 5, Texas should have the burden of proof. This Court need not decide which party bears the burden of proof on a § 5 challenge when drawing an interim map, because none of the § 5 issues in this case turns on which party bears that burden.

The parties further dispute what the threshold should be for determining whether a claim is "not insubstantial." At the time the Supreme Court issued its decision on January 20, the D.C. Court had denied the State's motion for summary judgment on preclearance. Some parties, including the United States,[18] argue that the denial of summary judgment in itself means that the Defendants' claims in the D.C. Court are "not insubstantial." However, as noted by the State, the Supreme Court was aware of the denial of summary judgment at the time of its January 20 decision, and thus presumably would have so stated if the denial of summary judgment should be equated with a conclusion that the claims were "not insubstantial."

---

[17] Docket no. 631 at 20.

[18] Docket no. 591 at 5. The United States also argues that any aspect of the enacted plan on which the United States has posed an objection involves a "not insubstantial" § 5 claim. Though Texas does not agree with this point, Texas contends that this Court should give more weight to objections posed by the United States than other parties in the D.C. Court.

In addition, the D.C. Court's summary-judgment decision did not address specific areas of the congressional plan. The Supreme Court noted that this Court was correct to take guidance from the State's plan in areas where there was "no serious allegation" that the district lines had a discriminatory intent or effect, despite the D.C. Court's implication in its summary-judgment opinion that the Plan as a whole suffered from a serious allegation of discriminatory intent. Thus, the Court agrees that the denial of summary judgment alone does not render "not insubstantial" all claims asserted in the D.C. Court, and we will consider each claim to determine whether it is "not insubstantial."

B. Section 5 challenges in the D.C. Court

Shortly after the Supreme Court issued its decision, the D.C. Court conducted its trial on the merits on the § 5 claims, and that entire record has now been submitted in this case. Given the exigencies of time, this Court is unable to review the entire record from the D.C. trial, but has reviewed the post-trial briefing in order to determine whether the claims are "not insubstantial." The Court will therefore summarize the various § 5 claims and issues from that briefing.

In its trial brief,[19] the United States argues that both the benchmark and enacted plans have a total of 10 ability districts, but that minority representation is proportionately decreased (retrogressed) in the enacted plan because minority voters would have the ability to elect in only 10/36 districts in the enacted plan, which is significantly less than the 10/32 ability present in the

[19] D.C. docket no. 203.

benchmark plan.[20] The United States contends that the appropriate inquiry for retrogression is whether the enacted plan is "more dilutive" than the benchmark plan, and one way to assess this is to determine the gap between the actual number of minority ability districts and the number of districts that would be roughly proportional to the minority share of the citizen voting age population ("CVAP").[21] An increase in the gap between the benchmark plan and the enacted plan would be retrogressive.

Applying this measurement, the United States asserts that Black and Hispanic citizens combined constitute 39.3% of Texas's citizen voting age population, which would be approximately 13 (39.3% x 32 seats = 12.6) seats in the benchmark and 14 (39.3% x 36 seats = 14.1) seats in the enacted plan.[22] Thus, if there are 10 minority ability districts in the benchmark plan, there is a proportionality gap of three seats, which is increased to four seats in the enacted plan – *i.e.*, the gap increases by one seat. Accordingly, the United States contends that, to avoid retrogression based on such a gap increase, the enacted

---

[20] The United States relied on the expert testimony of Dr. Lisa Handley, who found that Districts 23 and 27 provided minority voters with the ability to elect preferred candidates in the benchmark but not in the enacted plan, but that the enacted plan includes two new minority ability districts (34 and 35). She thus concluded that the degree of minority under-representation increases by one district in the enacted plan and, alternatively, that minority proportionate representation decreased from 31.3% of districts in the benchmark plan to 27.8% of districts in the enacted plan. D.C. docket no. 202 at 9.

[21] D.C. docket no. 203 at 14-15.

[22] D.C. docket no. 203 at 15-16.

plan must have a minimum of 11 minority ability districts (in which case the gap of three seats remains constant).[23]

The United States argues that benchmark CD 23 was an ability district in the benchmark plan,[24] but that Texas eliminated the ability of minority voters in CD 23 to elect preferred candidates in the enacted map. Dr. Handley determined that CD 23's score on the exogenous[25]

---

[23] The United States notes that this number does not rest on a determination that benchmark CD 25 provides minority voters with the ability to elect preferred candidates. D.C. docket no: 203 at 16 n.9. The United States does not take the position that CD 25 was an ability district in the benchmark plan.

[24] The United States asserts that the district's very creation in 2006 as a minority opportunity district to remedy the § 2 violation found by the Supreme Court in *LULAC v. Perry*, 548 U.S. at 425-42, is indicative of its status as a protected district under § 5. Further, the United States notes that Hispanics in the district succeeded in electing their preferred candidate to Congress in 2006 and 2008, and that candidate's loss in the 2010 election (the year of the Republican landslide) does not establish that the district lost its ability-to-elect status. D.C. docket no. 203 at 16-17. The United States' expert, Dr. Lisa Handley, also uses the Endogenous Effectiveness Index, which measures the percentage of contests since the district was drawn that the minority-preferred candidate won, to conclude that CD 23 was an ability district in the benchmark plan. An endogenous election analysis for a district measures the ability of minorities to elect minority-preferred candidates for the district itself. Because CD 23 was drawn in 2006, there are only three endogenous election contests to consider – 2006, 2008, and 2010. D.C. docket no. 161-5 (Dr. Handley's Report) at 4.

[25] Exogenous election analysis measures the ability of a set of statewide minority-preferred candidates to carry the congressional district at issue. Report of Dr. Lisa Handley, D.C. docket no. 161-5. "Exogenous elections are elections that are outside of the district at issue. Endogenous elections are elections that involve the district at

effectiveness index drops from 40% to zero in the enacted plan. Similarly, Dr. Alford's estimates show a decline from 46% to 29%, and the Texas Office of Attorney General's analysis indicates a drop from 30% to 10%.[26]

Regarding discriminatory purpose, the United States argues that the congressional plan was adopted with a discriminatory purpose because Texas intentionally used racial means to achieve a preferred partisan outcome. Further, the United States argues, Texas chose not to create any new minority ability districts despite the huge Hispanic population growth, and chose to remove hundreds of thousands of minority voters from districts in which they could elect their preferred candidates under the existing plan. The United States argues that this goal was achieved in part by intentionally splitting a number of cohesive minority communities and elsewhere packing minorities into existing ability districts to avoid creating any such new districts. The United States asserts that this occurred in the DFW area. The United States contends that Texas split precincts to draw boundaries using racial data.[27]

In support of its claim that Texas acted with a discriminatory purpose, the United States relies on several pieces of evidence. The first piece is an email from Eric Opiela to Gerardo Interiano, sent in November 2010 when they were both on staff for Texas House Speaker Joe Strauss. Opiela suggested that they should calculate Spanish Surname Turnout/Total Turnout ratio for all

---

issue." *Cottier v. City of Martin*, 445 F.3d 1113, 1121 n.5 (8th Cir. 2006).

[26] D.C. docket no. 203 at 17.

[27] D.C. docket no. 203 at 19.

VTD's[28] for the 2006 to 2010 general elections because "[t]hese metrics would be useful in identifying a 'nudge factor' by which one can analyze which Census blocks, when added to a particular district (especially 50+1 minority majority districts) help pull the district's total Hispanic Pop and Hispanic CVAPs up to majority status, but leave the Spanish Surname RV and TO[29] the lowest" and "[t]his is especially valuable in shoring up Canseco and Farenthold [two Republican incumbents]." The United States further asserts that CD 23 demonstrates that the mapdrawers were successful in achieving Opiela's stated goal because high-performing Hispanic precincts in Maverick County and the South Side of San Antonio were swapped out, and elsewhere precincts with higher Spanish Surname Voter Registration ("SSVR") but lower turnout were swapped in.

The United States further contends that split precincts are the most probative circumstantial evidence of a discriminatory purpose because no partisan data is available below the precinct level, and the 518 split precincts in the congressional plan are "unexplainable on grounds other than race."[30] The United States contends that the congressional plan splits precincts "in a manner that divides racial groups and weakens minority voting strength with alarming consistency, and a political justification does not explain this racially discriminatory

---

[28] A "VTD" is a voter tabulation district and is the functional equivalent of a voting precinct.

[29] "RV" stands for "registered voters." "TO" stands for "turnout."

[30] D.C. docket no. 203 at 22.

pattern."[31] The United States asserts that the concentration of split precincts in minority communities will have a disparate impact on minority voters because of expense and voter confusion, resulting in lower minority turnout.

Last, the United States contends that African American members of Congress Eddie Bernice Johnson, Sheila Jackson Lee, and Alexander Green and their districts were treated in a discriminatory manner by the mapdrawers because key economic features were removed from the districts.[32] Each of these representatives' offices was drawn out of their respective districts, and Johnson's home was drawn out of her district. These problems were not remedied despite the members' efforts.[33] In contrast, the United States contends, the evidence shows that Anglo members of Congress were treated preferentially, with even minor requests accommodated and special projects drawn into their districts.[34] At trial, Gerardo Interiano stated that the disparate treatment was mere "coincidence," and the United States asserts that this explanation is implausible.[35]

The Texas Latino Redistricting Task Force asserts that changes to CD 23 were retrogressive in effect and had a discriminatory purpose.[36] The Task Force asserts

---

[31] D.C. docket no. 203 at 22.

[32] D.C. docket no. 203 at 26.

[33] D.C. docket no. 203 at 26.

[34] D.C. docket no. 203 at 26.

[35] D.C. docket no. 203 at 26. The NAACP makes similar claims in its post-trial brief. D.C. docket no. 198.

[36] D.C. docket no. 206.

that "Ryan Downton testified that while creating CD 23, he swapped precincts into and out of the district based on Spanish surnamed voter registration and political performance even though he was aware that he might be selecting precincts for inclusion into CD 23 in which Latino turnout was lower than other precincts."[37] And "[d]espite the fact that the population of CD 23 was approximately 149,000 over the ideal district size, Mr. Downton moved a much larger number of 380,677 people out of the benchmark CD 23 [and] moved 231,514 new people into CD 23."[38] The Task Force asserts that, throughout the process, "Mr. Downton reported on his progress to ensure that CD23 would only elect the candidate of choice in one out of ten elections. (FOF at ¶ 291 ("Have it over 59% HCVAP, but still at 1/10.")).")[39]

The Task Force further complains that the enacted plan's "removal of Nueces County from the configuration of Latino opportunity districts in South and West Texas not only purposefully deprives thousands of Latino voters in Nueces County the opportunity to elect their preferred candidate – the change further makes impossible the creation of seven Latino opportunity districts in South and West Texas."[40] The Task Force asserts that Texas could have enacted a plan with 7 ability districts in South and West Texas, but chose not to.

---

[37] D.C. docket no. 206 at 10. Ryan Downton was general counsel to the Texas House Committee on Redistricting and was involved in drawing the congressional plan.

[38] D.C. docket no. 206 at 10 (citation omitted).

[39] D.C. docket no. 206 at 10. "FOF" refers to proposed findings of fact filed by the Task Force in the D.C. Court.

[40] D.C. docket no. 206 at 15.

The Gonzalez Intervenors and LULAC argue that the enacted plan is retrogressive because it reduces the number of minority ability districts from 11 to 10, and intentionally dismantles three minority-ability districts (23, 25, and 27).[41] Thus, minority representation is reduced from 34% to 28% of districts, even though minorities accounted for most of the population growth that entitles Texas to four new congressional seats. These parties contend that Texas officials ignored the protections of the VRA and intentionally discriminated against minorities by carving up ability districts. Despite enormous Hispanic population growth and the relatively small increase in Anglo population, they argue, Texas's enacted plan actually decreases the number of Hispanic ability districts by one (from eight to seven) and increases the number of Anglo districts by five.[42]

The Gonzalez Intervenors and LULAC point to the email from Opiela to Interiano revealing a racial purpose behind the configuration of CD 23,[43] the intentional

---

[41] D.C. docket no. 207.

[42] D.C. docket no. 207 at 5. According to the brief, between 2000 and 2010, Hispanic population grew from 6.7 million to 9.5 million, a 42% increase; Black population increased by 526,000 (23%) and White population increased by 457,000 (4.1%). *Id.*

[43] D.C. docket no. 207 at 6. The Gonzalez Intervenors and LULAC rely on the expert testimony of Dr. Stephen Ansolabehere to show that CD 23 is no longer an ability district. These parties further contend that the State's goal with regard to CD 23 was "to make CD 23 appear falsely to be a minority-ability district." Id. Looking at the various areas that were kept in CD 23 and those that were moved in and out, the area kept in CD 23 has the highest percent Anglo population, the highest turnout, and the lowest support for minority-preferred candidates; the area removed has the lowest percent Anglo population and highest combined Black and Hispanic

destruction of an effective coalition of Hispanic, African-American, and Anglo voters in CD 25, and the dismantling of CD 27 by moving more than 200,000 Hispanics in Nueces County into an Anglo district where they lose the ability to elect their preferred candidates.

The Gonzalez Intervenors focus on CD25, which they assert is a crossover district that must be recognized as an ability district in a § 5 retrogression analysis. They assert that they have provided extensive, unrefuted evidence of election returns and other information establishing that benchmark CD 25 was an effective crossover district in which Hispanics and Blacks were able to elect the candidates of their choice because of voting cohesion between minorities and because a significant portion of Anglos (but not a majority) consistently voted for the minority-preferred candidate.[44] The Gonzalez Intervenors contend that the dismantling of this effective crossover district constitutes retrogression.

With regard to discriminatory purpose, the Gonzalez Intervenors rely on the following evidence: (1) the statewide disproportionate impact of the plan on minorities[45]; (2) the specific disproportionate impact and

---

population, somewhat lower turnout, and highest support for minority preferred candidates; and the area added to CD 23 has the highest percent Hispanic population but the lowest turnout rate and somewhat lower support for minority preferred candidates than the areas taken out. *Id.* This combination of population changes reduced the electoral performance of minority preferred candidates by 3 to 4 %. *Id.* at 7.

[44] D.C. docket no. 207 at 9.

[45] D.C. docket no. 207 at 17. According to the Gonzalez Intervenors, although Anglos constitute approximately 45.3% of the total population of Texas, they are an outright majority of the

ripple effects resulting from the Legislature's discriminatory treatment of Hispanics in Nueces County[46]; (3) the history of discrimination against Blacks and Hispanics in Texas; (4) the specific sequence of events leading to the adoption of the plan; and (5) contemporaneous statements of Legislators and staff demonstrating a discriminatory purpose.

LULAC also contends that the enacted map intentionally fractures minority neighborhoods in the DFW area, specifically focusing on Districts 6, 12, 26, and 33.[47] LULAC notes that each district is bizarrely shaped to unnaturally avoid creation of majority-minority districts in that area and to ensure Anglo-dominated districts. LULAC further contends that CD 30 is packed with excessive minority population and thus "wastes" minority votes. LULAC relies on evidence of historical

---

population in 20 of the 36 districts, and a plurality in 3 more, for a total of 64% of congressional districts. And although the statewide percentage of Anglo voters decreased, the number of districts in which Anglos are a majority of the citizen voting age population increased from 22 to 25 (69% of districts).

[46] D.C. docket no. 207 at 20. These parties argue that the Legislature could have chosen to take the Nueces County Hispanic population and use it to help construct a seventh majority Hispanic district in the Rio Grande Valley, but instead chose to remove them from South Texas and put them in an Anglo district where they are effectively stranded. Thus, they argue, this decision eliminated the possibility of creating an additional minority Hispanic district without destroying CD 25 to create CD 35, and also left no flexibility for the creation of an additional Hispanic seat in Harris County. These parties argue that alternative plans did not create these problems.

[47] D.C. docket no. 205 at 7. The Task Force also contends that the State had an improper racial purpose in districting in the DFW area. D.C. docket no. 206 at 16.

discrimination, the unusual process leading to passage of the plan, and contemporary statements by members of the decisionmaking body that exhibit racially discriminatory intent. LULAC contends that even if there are 11 ability districts in the enacted plan, "the new plan would still be retrogressive because the level of representation statewide would be reduced."[48]

In its trial brief,[49] Texas argues that the only proper way to determine retrogression of ability to elect is to use exogenous elections for the benchmark and enacted plans. Because endogenous elections can only be examined for the benchmark district, Texas asserts, "endogenous election analysis does not permit a '*comparison* of a jurisdiction's new voting plan with its existing plan.'"[50] Texas asserts that its functional analysis is preferable to the United States' analysis because it uses more statewide elections weighted toward more recent elections and measures the statewide ability to elect minority-preferred candidates across all districts at issue.[51] Even if the United States' approach is required, the State argues that it is still appropriate to use exogenous elections weighted toward more recent contests.

Applying its statewide functional analysis, Texas argues, the congressional plan does not retrogress

---

[48] D.C. docket no. 205 at 17.

[49] D.C. docket no. 201. In its brief, Texas reserved its argument that minority voters have the ability to elect in any district where a single minority group constitutes greater than 50% of the citizen voting age population.

[50] D.C. docket no. 201 at 4 (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (emphasis added)).

[51] D.C. Docket no. 201 at 5.

minority voting strength but in fact "substantially improves Hispanic voting strength."[52] Relying on the testimony of its expert Dr. Alford, Texas contends that minority-preferred candidates win 13 additional statewide contests in the enacted plan over the benchmark, which demonstrates that no retrogression occurred. Using the binary approach espoused by the United States requires the same conclusion, Texas asserts. Texas contends that the United States improperly counts CD 23 as an ability district in the benchmark but not the enacted plan, "despite the fact that minority voters elected their candidate of choice less than half the time under both the five- and ten-election exogenous indices."[53] Texas argues that "the United States converts CD23 from non-performing to an ability district based on erroneous endogenous analysis" and its methodology is inappropriate for CD 23 "because it relies on a meager three cherry-picked elections."[54]

Texas further disputes the Gonzales Intervenors' claim that CD 25 is a protected ability-to-elect district in the benchmark plan, asserting that the United States has not taken that position.[55] Texas contends that CD 25 is not a protected coalition or crossover district because (1) it has an Anglo CVAP over 60%, a Hispanic CVAP ("HCVAP") of 25%, and a Black CVAP under 10%; (2) Anglos do not vote as a bloc to defeat minority-preferred candidates; and (3) minorities do not vote cohesively in

---

[52] D.C. docket no. 201 at 15.

[53] D.C. docket no. 201 at 16.

[54] D.C. docket no. 201 at 16.

[55] D.C. docket no. 201 at 16 ("Neither Texas nor the United States takes that position.").

Democratic primaries.[56] Accordingly, Texas contends, CD 25 does not factor into the retrogressive effect analysis.[57]

With regard to the discriminatory purpose inquiry under § 5, Texas emphasizes that both a discriminatory purpose and effect are required to find a violation (*i.e.*, disparate impact is alone insufficient). Thus, Texas argues, the inquiry must be whether the Legislature enacted the plan because of its effect on race, not "in spite of" its known effects on race. Texas contends that the districting decisions have race-neutral explanations, and thus discriminatory purpose cannot be found even if the Legislature knew that the race-neutral purposes would disparately impact racial minorities. Texas asserts that the Defendants rely on four principal arguments to support the purposeful discrimination claim: (1) the lack of proportional representation; (2) the configuration of CD 23; (3) the configuration of CD 26; and (4) alleged disparate treatment of Black members of the congressional delegation.[58]

With regard to the lack of proportional representation, Texas argues that proportional representation is expressly not required by the VRA. Thus, Texas contends, once it drew one additional minority opportunity district that it believed to be

---

[56] D.C. docket on. 201 at 16.

[57] Texas further argues that the D.C. Court should reconsider its prior decision that coalition and crossover districts are protected ability districts for § 5 purposes in light of the Supreme Court's decision in *Perry v. Perez*. Texas argues that such districts are not protected, but even if they are, the minority coalition must be shown to vote cohesively in the primary.

[58] D.C. docket no. 201 at 26.

required, it lacked a "strong basis in evidence" to conclude that consideration of race was "reasonably necessary" to satisfy either § 2 or § 5 of the VRA, and it risked violating the Equal Protection Clause if it sought to create additional districts based on race.[59]

Texas disputes the allegations related to CD 23 by arguing that (1) Downton testified that he did not use voter turnout statistics to draw CD 23; (2) there is no evidence Opiela played a role in drawing CD 23; (3) Downton testified that he had the legitimate goal of protecting a Latino Republican incumbent (Canseco); (4) Downton could not target low-turnout Hispanics because RedAppl[60] does not have such functionality; and (5) the evidence shows that Hispanics in enacted CD 23 are actually more likely to turn out on election day.[61]

Texas further contends that it did not draw the CD 26 "lightning bolt" in DFW with a discriminatory purpose, noting that the benchmark plan already contained a

---

[59] D.C. docket no. 201 at 26. During redistricting and throughout the litigation, Texas has maintained the position that § 2 does not require the State to draw minority coalition districts. Thus, the State steadfastly refused to create any coalition districts, and the State's arguments are made entirely in the context of minority opportunity districts in which one single minority or language group constitutes a working majority of the population of the district. As discussed, *infra*, the Court is unable to conclude that Plaintiffs are likely to succeed on those § 2 claims that are based on a coalition of minority voters.

[60] RedAppl is the State's districting software program. As described by the Supreme Court in *Bush v. Vera*, 517 U.S. 952, 960 (1996), "REDAPPL permit[s] redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data [are] superimposed."

[61] D.C. docket no. 201 at 27-28.

southern protrusion extending from Denton into Tarrant County, which was not disturbed by the Supreme Court in *LULAC*, and that this protrusion was narrowed to accommodate requests from Republican U.S. Representative Kay Granger and Democratic State Representative Marc Veasey. Texas argues that both in the benchmark and enacted plan, the protrusion contains a high concentration of Democratic voters consistent with a political purpose. Texas contends that because the configuration of the district is equally consistent with a race-neutral purpose, the fact that it may have disparately affected minorities does not establish impermissible purpose.

Last, with regard to the allegations that the Legislature intentionally snubbed minority-preferred members of Congress, Texas contends that the Legislature attempted to accommodate requests from lawmakers, but did not make a concerted effort to solicit redistricting preferences of representatives from either party. Because the mapdrawer did not know where the district offices were located, Texas contends that at most it "was guilty of blithe indifference to the wants of certain Congressmen," which does not violate the Constitution or the VRA.

III. Plan C226 - a proposed compromise map

In order to permit the primary elections to go forward in a timely manner, some Plaintiffs and Intervenors conferred and developed a compromise map that they submitted to the Court for consideration. The compromise map attempts to address those § 5, § 2, and Fourteenth Amendment claims that are "fairly at issue" and thus within the scope of this Court's remedial

authority. The map is endorsed by the Texas Latino Redistricting Task Force and by Congressmen Cuellar and Canseco.[62] C226 is opposed by Intervenor Congressman Joe Barton.[63] It is also opposed by MALC in part[64] and by the Rodriguez Plaintiffs, Quesada Plaintiffs, LULAC, Texas NAACP, and the African-American Congressional Member Plaintiffs.[65] The Court has independently reviewed as much of the record as possible and it has carefully evaluated all of the arguments in opposition to Plan C226 in deciding whether it would be an acceptable interim plan.

Although, as noted, several parties have urged the Court to wait for a decision on preclearance from the D.C. Court, the Court heard testimony from the parties that in order to proceed with a May 29 primary, a map needed to be in place by March 3. Thus, the Court concluded that it could not wait for a decision from the D.C. Court without further delaying the primary and causing substantial

---

[62] Docket nos. 606, 610, 613, 676. The Task Force Plaintiffs note that C226 does not necessarily address or resolve all of their claims, but they agree that it is an acceptable compromise to permit the primary elections to occur without further delay.

[63] Docket no. 609, 621. Congressman Barton urges the Court to wait for a preclearance decision from the D.C. Court before drawing any interim map. In the alternative, Barton also submits a proposed interim map, C227.

[64] Docket no. 671 (arguing that CD 23 in C226 incorporates legal defects from the enacted plan). Plaintiff MALC states that C226 adequately addresses its claims in some areas, but it is not the only way to remedy the alleged constitutional and statutory violations. Docket no.665.

[65] Docket no. 659; docket no. 664 (discussing objections to CD 33 and proposed alternative plan).

hardship to the Republican and Democratic parties, which have scheduled their conventions for June. Releasing a map in time for a unified May 29 primary avoids a split primary and the resulting costs and burdens on the counties and political parties, which must administer and conduct the elections.[66]

A. Analysis of C226

The Court has independently evaluated the proposed compromise map, C226, and concludes that it sufficiently resolves the "not insubstantial" § 5 claims and that no § 2 or Fourteenth Amendment claims preclude its acceptance under a preliminary injunction standard. The Texas Legislative Council, however, has identified what appear to be inadvertent intrusions of congressional districts into six different counties. These intrusions consist of either one or at most several census blocks and all contain either no people or very few people. The boundaries between districts otherwise follow the county lines in the areas of the intrusions. Elimination of these intrusions can be accomplished with minimum population deviation and avoids the possibility that a county will have to fashion a voting precinct consisting of no people or very few people because of a map-drawing error. Accordingly, the Court finds that Plan C235, which corrects these technical

---

[66] *See* January 27, 2012 hearing transcript, in which the parties presented evidence of logistical difficulties with having an election in June, since many public facilities and schools are closed, the significant cost to political parties who have already contracted for and placed deposits on Convention facilities in June, and the extremely high (and unbudgeted) costs to counties of a split primary, and corresponding voter fatigue. *See also id.* Tr. 148 (testimony that a split primary would cost Bexar County an estimated additional $375,000).

errors contained in Plan C226, can be adopted as the interim plan.

B. District 23

The Court finds that the § 5 retrogressive effects claim with regard to CD 23 is not insubstantial. The effects prong requires a comparison between CD 23 in the benchmark and CD 23 in the enacted plan. The parties vigorously dispute the appropriate method for determining whether CD 23 was or is an ability district and for comparing the status of CD 23 between the two plans. The United States endorses using endogenous election data for benchmark CD 23, and notes that six different Circuit Courts of Appeals have determined that endogenous elections are the most probative and relevant contests when assessing racially polarized voting.[67] The United States further asserts that Texas's argument in favor of exogenous elections conflicts with its expert's (Dr. Alford) previous statements that endogenous elections are more probative than exogenous elections.

Texas argues that because endogenous election analysis can only be conducted for the benchmark plan, it does not fairly permit a comparison with the enacted plan, and thus exogenous elections, which can be conducted for both plans, should be used. Determining which method to use for making the retrogressive effects comparison between benchmark and enacted plans is an issue that must be resolved by the D.C. Court. The Court finds that whether CD 23 is effectively retrogressed is a not insubstantial § 5 claim.

---

[67] D.C. docket no. 203 at 3-4 (listing cases).

Because the § 5 retrogressive effects claim regarding CD 23 is not insubstantial, the Court cannot incorporate enacted CD 23 into the interim plan. C235 attempts to adjust CD 23 to account for the § 5 claims. The parties dispute the degree to which it has effectively done so. The Texas Latino Redistricting Task Force asserts that C235 restores CD 23 insofar as the win-loss record of Latino preferred candidates is similar to benchmark CD 23. The Task Force analyzed 12 racially contested exogenous elections from 2002-2010 in which Latinos sought to elect a Latino candidate, and on average the Latino preferred candidates in CD 23 in Plan C235 garnered within half a percentage point (less) of the support they garnered in benchmark CD 23.[68] Congressman Canseco also argues that CD 23 has been restored.[69]

MALC and other Plaintiffs contend that CD 23 has not been fully restored because its actual performance in terms of votes is less than it was in the benchmark. Specifically, these Plaintiffs contend that in almost all elections, the choice of the Hispanic voters does slightly more poorly than in the benchmark.

The Court has carefully considered these arguments. The State has demonstrated that election performance has been restored to the benchmark level of 3 out of 10 racially contested exogenous general elections.[70] A report prepared by the Texas Legislative Council also demonstrates that performance levels in terms of win-loss numbers have been restored to benchmark levelsunder

---

[68] Docket no. 638 at 35 (and docket no. 638 Ex. S).

[69] Docket no. 676.

[70] Docket no. 675 at 3.

the United States' preferred methodology developed by Dr. Handley. And the Texas Latino Redistricting Task Force's analysis demonstrates that CD 23 has a comparable win-loss record to the benchmark district. The Court therefore concludes that it has been sufficiently restored to benchmark level, even if the margin of victory has slightly decreased.

Because C235 restores CD 23 to benchmark performance, and Plaintiffs argued that CD 23 in the benchmark was an opportunity district, C235 also resolves the Plaintiffs' § 2 claims premised on the alleged failure to include 7 Latino opportunity districts in South/Central/West Texas. Accordingly, the Court need not consider the merits of those claims, and makes no ruling on whether CD 23 is an opportunity district in the enacted map. The Court also need not decide whether the § 5 discriminatory purpose claims related to CD 23 are not insubstantial.

C. Statewide Retrogression (United States)

As noted above, to avoid an increase in the "gap," the United States asserts that any interim map must have at least 11 ability districts. The United States further asserts that retrogression is measured on a state-wide basis, so any retrogression in a particular district can be cured by creating new districts anywhere in the State.[71] The Court need not decide whether this claim is "not insubstantial" because C235 addresses the United States' concerns by including 11 districts that the United States would consider ability districts.

---

[71] Docket no. 630 at 2.

D. Dallas-Fort Worth area

C235 also makes substantial changes to the Dallas-Fort Worth area. As noted by the Supreme Court in *Perry v. Perez*, aspects of the enacted map's configuration of the Dallas-Fort Worth area "appear to be subject to strong challenges in the § 5 proceeding." *Perez*, 132 S. Ct. at 944. In making this statement, the Court cited to a portion of the United States' brief in the D.C Court, in which it asserted that "the minority population [in DFW] was purposely manipulated to decrease current and future minority voting strength" and that "the State has pulled strangely-shaped minority population areas out of certain districts in order to submerge them in larger Anglo populations and to reduce minority voting strength."[72] The United States further asserted that "[t]he data utilized in making some of these changes were race-based, as opposed to partisan."[73] The Supreme Court also cited to exhibits showing that the CD 26 "lightning bolt" extending into CD 12 contains concentrated Hispanic populations.

In its trial brief in the D.C. Court, the United States asserts that the intentional cracking of minority populations is clearest in CD 6, in which there are 39 VTD splits in the "finger" that reaches up from majority Anglo Ellis and Navarro Counties to remove large concentrations of African-American and Hispanic population from Dallas and Tarrant Counties, and 28 of the 39 split VTDs are in majority minority precincts.[74]

---

[72] D.C. docket no. 79-2 at 36, 38.

[73] D.C. docket no. 79-2 at 38.

[74] D.C. docket no. 203 at 22.

These splits also divide minority communities of interest in Arlington, Cedar Hill, and Duncanville into three different congressional districts.[75] Similarly, in CD 26, there are 49 split precincts, 38 of which are within the "lightning bolt" coming down into Tarrant County.[76] The United States asserts that the eastern edge of the lightning bolt divides African-American communities from Hispanic communities according to race, and because the area is homogeneously Democratic, the split could not have been guided by political data.[77]

LULAC also argued in the D.C. Court that the enacted map intentionally fractures minority neighborhoods in the DFW area, specifically focusing on districts 6, 12, 26, and 33.[78] LULAC notes that each district is bizarrely shaped to unnaturally avoid creation of majority-minority districts in that area and to ensure Anglo-dominated districts. The D.C. Defendants further contend that CD 30 has been "packed" with additional minority population that was not necessary for minorities to continue to elect their preferred candidate, which intentionally "wastes" minority votes.[79]

The D.C. Defendants assert classic "cracking" and "packing" intentional vote dilution discrimination

---

[75] D.C. docket no. 203 at 22.

[76] D.C. docket no. 203 at 23.

[77] D.C. docket no. 203 at 23. The United States makes these same arguments before this Court in support of its position that there is a reasonable probability that Texas will fail to gain preclearance in this area. Docket no. 630 at 14.

[78] D.C. docket no. 205 at 7.

[79] D.C. docket no. 205 at 8.

claims.[80] Although minorities are more than 50% of the combined population of Dallas and Tarrant Counties, in only two of the eight districts in the enacted plan that include parts of Dallas and Tarrant Counties do minorities make up more than 50% of the voting age population.[81] Although the D.C. Defendants contend that populations were split along racial lines to dilute minority voting strength, Texas contends that disparate impact does not establish discriminatory intent and that there are race-neutral explanations for the district lines. Texas

---

[80] *See Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). In *Voinovich*, the Supreme Court noted that "[d]ividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory." *Id.* at 153. This is "cracking" the minority population. The Court further described how "packing" dilutes minority voting strength: "A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates." *Id.* at 153-54.

[81] In CD 6, Black plus Hispanic voting age population is 51.5% and in CD 30, the allegedly packed district, Black plus Hispanic voting age population is 81.5%. In districts 5, 12, 24, 26, 32, and 33, Black plus Hispanic voting age population is between 30.3% and 35.5%. Further, there is only one district in which Blacks and Hispanics make up more than 40% of the citizen voting age population, and they make up 74% of that district (CD 30). Black plus Hispanic citizen voting age population is 24.8% in CD 5, 38.8% in CD 6, 28.3% in CD 12, 21.2% in CD 24, 22.2% in CD 26, 23.3% in CD 32, and 25.9% in CD 33.

argues that it engaged in political gerrymandering, and that it may do so regardless of its awareness of an adverse effect on minorities. Texas further asserts that splitting precincts is permissible and there is no basis for concluding that split precincts are evidence of an impermissible racial purpose.

More specifically, Texas argues that the CD 26 "lightning bolt" is similar to the one in the benchmark, and points to a political shading exhibit that demonstrates that the "lightning bolt" contains high concentrations of Democrats, who just happen to be minorities. However, Texas's post-trial briefing fails to counter Plaintiffs' allegations with regard to CD 6 and CD 33, or the alleged packing of CD 30. Although it is difficult to tell whether lines were drawn on partisan or racial considerations, the high number of split precincts in the protrusions increases the likelihood that the mapdrawers were focused on race, because partisan voting data is not available below the precinct level. Further, Texas has not offered any explanation why the precincts were split or demonstrated that political explanations are more likely than racial ones. Whether the district lines are better explained by politics or racial considerations is a not insubstantial issue that must be decided by the D.C. Court. Accordingly, this Court may not incorporate the enacted plan's configuration of DFW districts.

C235 attempts to address the § 5 claims that are not insubstantial in its configuration of DFW districts. The Latino Task Force contends, with no objection from the State, that C235's DFW configuration addresses the § 5 claims by modifying districts 6, 12, 26, 30, and 33 from the enacted plan. Specifically, it withdraws the encroachments into minority communities from the Anglo

districts surrounding DFW, including the CD 26 "lighting bolt" into CD 12 and the encroachments from CD 6 and CD 12 into minority areas. "The population left behind in Dallas and Tarrant Counties is encompassed" by the new CD 33, and "CD 33 is moved eastward to fill in the space created by retracting CDs 6, 12, and 26 towards their population bases."[82] The Court further notes that the packing allegations are addressed, as the minority population of CD 30 is decreased.[83]

C235 proponents note that it is not possible to simply undo the alleged discrimination by returning to the benchmark because of population growth and the addition of new seats.[84] The Latino Task Force contends that the DFW configuration follows traditional redistricting criteria: accommodating the fastest population growth in the region and accommodating the wishes of congressional incumbents.[85] Specifically, the configuration accommodated the desires of congressional incumbents to maintain their population bases and geographic areas of special concern. Further, the borders of CD 33 are drawn to leave CD 24 unchanged from the enacted map, to work with the existing boundaries of CD 32 in Dallas County, and to make minimal changes to CD 30 except as to accommodate claims from the incumbent.

---

[82] Docket no. 638 at 37-38.

[83] According to the NAACP's trial brief in the D.C. Court, benchmark CD 30 was 76.7% Hispanic plus Black voting age population, and enacted CD 30 was 81.5% Hispanic plus Black voting age population. D.C. docket no. 198 at 11. According to the Red-100 report prepared by the Texas Legislative Council, CD 30 in Plan C235 is 75.9% Hispanic plus Black voting age population.

[84] Docket no. 660 at 4.

[85] Docket no. 638 at 37.

C235 proponents note that the changes to the DFW area actually make the districts more compact as a whole, that race did not predominate, and that CD 33 reflects population growth.

The Court concludes that CD 33 is not a minority coalition district and was not drawn with the intention that it be a minority coalition district. Opponents of the compromise map argue that it does not go far enough to cure the fragmentation, especially with regard to African Americans, and suggest a plan where "all of the key Hispanic and African American neighborhoods in Fort Worth are united into CD33."[86] However, the interim plan must address the allegations of discrimination without going beyond them. C235 adequately does so. Thus, the lightning bolt and other incursions are removed, but it would be inappropriate to intentionally create a coalition district on the basis of race or otherwise intentionally unite populations based on race. The contours of CD 33 are a result of addressing the "not insubstantial" § 5 claims of cracking and packing and the application of neutral redistricting criteria. Thus, although race was necessarily considered in drawing CD 33 to some degree, the use of race was appropriate to remedy the alleged race-based discrimination that occurred and does not exceed what is constitutionally permissible.

The Court finds that C235 adequately resolves the "not insubstantial" § 5 claims but goes no further than required under *Perry v. Perez*. The Court need not analyze Plaintiff's Fourteenth Amendment claims related to DFW because they are resolved by C235.

---

[86] Docket no. 659 at 13.

Further, the Court cannot conclude at this time that Plaintiffs are likely to succeed on the merits of their claim that § 2 requires a Latino opportunity district in DFW. Only one demonstration map contained a district with a majority Hispanic citizen voting age population (C190), and that district was not reasonably compact and would not likely survive strict scrutiny under the Supreme Court's equal protection jurisprudence. All other demonstration maps contained either inadequate Latino opportunity districts in terms of Hispanic citizen voting age population or coalition districts. As noted below, the Court is unable to conclude at this time that Plaintiffs are likely to succeed on their § 2 claims premised upon coalition districts.

E. Districts Represented by African-American Congresspersons

C235 makes changes to CDs 9 and 18 in the Houston metropolitan area and CD 30 in Dallas to address claims that the Legislature intentionally discriminated against the three African-American plurality and majority districts (which are also represented by African Americans). The United States contends that there is a reasonable probability that Texas will not gain preclearance regarding these districts because they were drawn with discriminatory purpose.[87] The United States asserts that substantial evidence was presented at the D.C. trial that the map drawers removed economic engines from these districts and had drawn members' offices out of each of their districts. In contrast, minor requests by Anglo Members of Congress were

[87] Docket no. 630 at 14-15.

accommodated, with one Member asking for a San Antonio country club to be put in his district (Rep. Lamar Smith), another wanting his grandchildren's private school in his district (Rep. Kenny Marchant), and still another asking that her campaign office be moved back into her district (Rep. Kay Granger).[88] That said, at least one Anglo Congressman, Lloyd Doggett, had his entire district dismantled in a manner that may unseat him, and was arguably treated worse than were the African American members.[89]

The United States asserts that there is a reasonable probability that Texas will not gain preclearance because it fails to adequately explain this disparate treatment, and its claim that the disparate treatment was merely coincidental is implausible. Texas itself has urged the Court to give greater deference to objections made by the United States in the preclearance proceedings. The United States contends that the claims related to the unequal treatment of minority districts represented by African-American members of Congress are "not insubstantial."[90] The Court agrees – though Texas contends that any disparate treatment was simply

---

[88] The NAACP makes similar claims in D.C. and in this Court. In docket no. 625, the NAACP and the Individual Representatives contend that "the State redrew districts 9 and 18 so as unnecessarily to replace core minority areas with areas slated for Anglo population growth and thereby diminish minority voting strength" and removed "economic generators from each Black congress member's district so as to reduce the voters' influence, and remove[d]from each the district office that provides services for minority voters."

[89] Lloyd Doggett does not represent a majority minority district.

[90] Docket no. 630 at 15.

inadvertent, the mapdrawers took care to accommodate even minor concerns of Anglo congresspersons and failed to ensure that any requests of the three African-American members were considered or accommodated. Whether the disparate treatment was purposeful or inadvertent is a not insubstantial issue to be resolved by the D.C. Court.

C235 attempts to provide an interim remedy to resolve these complaints by redrawing the districts to include member offices and homes, and to restore economic engines to the district. Though Rep. Johnson has complaints about other areas being removed from CD 30, the Court cannot ensure that all requests are accommodated. Rather, C235 seeks to remedy the alleged discrimination that occurred. Insofar as C235 is not purposefully discriminatory and is not alleged to be retrogressive with regard to these districts, the Court cannot remedy all asserted deficiencies in the districts under C235.

F. Central Texas/CD 25/CD 35

C235 retains the configuration of CD 35 and CD 25 from the enacted plan. It is undisputed that much of Texas's overall population growth occurred in Bexar County and Travis County and areas along the I-35 corridor. Therefore, it is unsurprising that the Legislature's enacted map placed a new district in that area – CD 35. CD 35 connects communities in Austin/Travis County and San Antonio/Bexar County, and the northern portion of CD 35 includes the bulk of the Hispanic minority population in Austin/Travis County that was formerly in CD 25. It is undisputed that CD 35 is a Latino majority district.

Certain Plaintiffs, but primarily the Rodriguez Plaintiffs, contend that CD 35 is an impermissible racial gerrymander, and that the State impermissibly discriminated against minority voters in the way that minorities in Travis County and former CD 25 have been treated in the enacted map. In the D.C. Court, the Gonzalez Intervenors assert that benchmark CD 25 was a protected crossover district, and thus its presence must be factored into the retrogressive effects analysis.

Even though the Supreme Court has recognized the benefits of crossover districts in achieving the goals of the VRA, § 2 does not mandate preserving crossover districts. *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009). Further, even if the D.C. Court concludes that benchmark CD 25 was a protected crossover district under § 5, CD 35 includes the bulk of the Travis County minority Hispanic population from CD 25, and its creation potentially offsets the loss of CD 25 for Hispanics so long as it is an appropriate § 2 district and an ability district for purposes of § 5.

The Latino Task Force contends that CD 35 is a new Latino opportunity district for purposes of § 2 and a Latino ability district for purposes of § 5. The Latino Task Force argues that the creation of an additional Latino opportunity district was required by § 2 (because 7 Latino opportunity districts are required for South/Central/West Texas), and that CD 35 is an appropriate § 2 district because it satisfies all *Gingles* criteria.[91]

Whether CD 35 crosses the line from a permissible § 2 district to an impermissible racial gerrymander is a close call. A racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is

---

[91] Docket no. 638 at 36.

constitutionally suspect, even if the reason for the racial classification is benign or remedial. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996). As explained by the Supreme Court,

> [T]hose who claim that a legislature has improperly used race as a criterion, in order, for example, to create a majority-minority district, must show at a minimum that the "legislature subordinated traditional race-neutral districting principles . . . to racial considerations." Race must not simply have been "*a* motivation for the drawing of a majority-minority district," but "the '*predominant* factor' motivating the legislature's districting decision." Plaintiffs must show that a facially neutral law is "'unexplainable on grounds other than race.'"
>
> The Court also has made clear that the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence. Hence, the legislature "must have discretion to exercise the political judgment necessary to balance competing interests," and courts must "exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race."

Easley v. Cromartie, 532 U.S. 234, 241-42 (2001) (citations omitted) (emphasis in original). Thus, to trigger strict scrutiny, Plaintiffs must show that race was the "predominant" consideration in drawing the district lines such that the Legislature subordinated traditional race-neutral districting principles to racial considerations. *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality opinion).

The State argued to the D.C. Court in its motion for summary judgment that CD 35 is a minority opportunity district.[92] Further, Ryan Downton, the lead person in drawing the original congressional plan (C125), testified that he purposefully drew CD 35 as a Hispanic majority district. Tr. 916.[93] Downton further testified that he took the "idea" of CD 35 "from the map that MALDEF submitted to us," which "was trying to create a Hispanic majority district in central Texas." Tr. 916; *see also* Tr. 918 ("When we drew the map originally, we were focused on getting District 35 above 50 percent of HCVAP."); Tr. 989 ("we were trying to create a Hispanic majority district"). This testimony establishes that a primary goal[94] in drawing CD 35 was the creation of a Hispanic majority district. However, intentional creation of a majority minority district is insufficient, standing alone, to trigger strict scrutiny. *Vera*, 517 U.S. at 958-59.

The State argues that non-racial factors also shaped CD 35, including placing the district where the population growth occurred and partisan politics (particularly, targeting Congressman Lloyd Doggett). Thus, this

---

[92] D.C. docket no. 41.

[93] "Q: And was it your understanding that one of the objectives of the legislature was to try to create a new citizen voting age population majority district for Hispanics in Texas? A: Yes. I was directed to do that."

[94] The evidence establishes that Downton was responsible for the original configuration of CD 35 and for the subsequent changes that were made to it. As the actual mapdrawer, Downton's state of mind and decisionmaking appears to be the most relevant evidence concerning the extent to which race played a role in determining district lines.

appears to be a "mixed motive" case as described by a plurality of the Court in *Bush v. Vera*, 517 U.S. at 959.

In a mixed motive case, determining when traditional districting criteria have become subordinated to race is highly fact specific and difficult. For example, although CD 35 in the enacted plan joins populations in Travis County and Bexar County over 80 miles apart, the benchmark plan divides Travis County among three congressional districts, joining portions of Travis County with Bexar County in CD 21 and portions of Austin/Travis County with Houston/Harris County in CD 10 that are even farther apart. Congressman Lloyd Doggett and Travis County Democrats appear to have been targeted by the Republican-controlled Legislature, with the result being further division of Austin and Travis County into five congressional districts to ensure that Democratic voters are contained in majority-Republican districts.[95]

Though CD 35 is not particularly compact, the VRA does not require compact districts. Nor is it as non compact or bizarrely shaped as other districts the Supreme Court has found to be unconstitutional. Nevertheless, the Supreme Court has stated that bizarre shape is not required to invoke strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 912 (1995) ("Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face

---

[95] For example, an email sent from Eric Opiela to Rep. Lamar Smith and Gerardo Interiano on December 17, 2010 contained an apparent online discussion of a demonstration map, the "centerpiece" of which was "the 8-way split of Austin" such that Doggett "runs in a 58 percent McCain district no matter what." Docket no. 323 (part 2) at 24.

before there is a constitutional violation."). However, "where the district is not so bizarre on its face that it discloses a racial design, the proof will be more 'difficul[t].'" *Id.* at 914.

In *Bush v. Vera*, racial criteria had a qualitatively greater influence on the drawing of district lines than race-neutral criteria, 517 U.S. at 969, and race predominated over other districting criteria in determining the district's boundaries, *id.* at 970-71. Specific portions of boundary lines in districts found unconstitutional have been "tailored perfectly to maximize minority population," *id.* at 971, whereas Plaintiffs in this case have not convinced the Court at this stage that district lines in CD 35 were manipulated to such an extreme degree.

In their briefing, some Plaintiffs complain that CD 35 has 100 precinct cuts, but they point to only two specific precinct cuts in Travis County where racial considerations appear to have controlled. David Butts testified about (1) the splitting of precinct 433 to divide St. Edward's University to place the dorms (with large Hispanic student population) in CD 35[96] and the administration building in CD 21; and (2) and the splitting of precinct 440 to include an arrowhead shape containing the Riverside apartments within CD 35. Tr. 1199.

---

[96] Tr. 1197-98. *See Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 670 (5th Cir. 2009) (noting that "it is obviously questionable whether splitting members of geographically contiguous communities in interest, *i.e.*, the colleges, into separate constituencies would have been legally satisfactory" and "[a]ny plan that split USM into multiple wards, furthermore, would be highly suspect on its face").

Mr. Butts further noted that in the northern part of CD 35 "they split through [precinct] 141, which is heavily minority, which is – let's see, 141 right there to go to here and go up into this area right here which is heavily Hispanic and black. Now, the interesting thing is that 140 is heavily Hispanic also. Not as heavy as this precinct, but they didn't reach up and grab that one. I'm not sure why, but they didn't." Tr. 1195. And he testified that "you have Hispanics also going into Congressional District 10." *Id.* Thus, this testimony indicates that Hispanics were both included and excluded from CD 35. Butts further testified that the "squiggle" at the northern part of CD 35 is a substantial Hispanic population, Tr. 1196, which corresponds with Downton's testimony that the "squiggle" was included to increase Hispanic population.[97] However, racial shading exhibits demonstrate that the "squiggle" both includes and excludes areas with substantial Hispanic population. Thus, Plaintiffs' assertion that the Legislature "went to extreme lengths to gather in Hispanic population" is not fully supported by the evidence.

In addition, part of CD 35's unusual shape is the 50-mile long, 3-mile wide corridor running along I-35 that joins Travis and Bexar Counties. However, the evidence indicates that CD 35 was originally much wider along this portion, and the narrowing was the result of a request by State Representative Kuempel (R), who lives in Guadalupe County and asked that the mapdrawers keep as much of Guadalupe County whole as possible. Downton

---

[97] Tr. 989 ("If that is a Hispanic area, and I think it is likely that it is, then, yes, it would have been included in District 35 as we were trying to create a Hispanic majority district.").

testified that he put Guadalupe County in CD 15 to accommodate this request. Though Guadalupe County was not in fact kept whole, the Court is unaware of any evidence explaining why a small, predominantly Anglo portion of Guadalupe County was kept in CD 35, and thus cannot determine whether there was a racial or non-racial reason.[98]

Thus, the Court is unable to conclude at this time that Plaintiffs have shown "intensive and pervasive use of race" or that the district's shape "was essentially dictated by racial considerations." *Vera*, 517 U.S. at 972-73. Accordingly, the Court does not find that Plaintiffs are likely to succeed on their claim that CD 35 is subject to strict scrutiny. Nor have Plaintiffs demonstrated a substantial likelihood that CD 35 would fail a strict scrutiny analysis if strict scrutiny applies.

The Court is unable to conclude that Plaintiffs have made the necessary showing on the claims relating to the dismantling of CD 25. As a legal matter the Supreme Court has recognized that if "a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). As a factual matter, however, the Court cannot conclude at this time that the dismantling of CD 25 was motivated by a discriminatory purpose as opposed to partisan politics.

---

[98] According to statistics provided by the Texas Legislative Council (Report Red-100), 17% of the population of Guadalupe County is in CD 35 and 83% is in CD 15. The portion ofCD 35 that reaches into southern Guadalupe County picks up 22,845 people, including 5,844 Hispanics.

The Court recognizes the complaints of African-American voters that their voting ability is retrogressed in the enacted map by the loss of benchmark CD 25, which they assert is a functioning crossover district.[99] However, serious and difficult questions remain to be decided in the D.C. Court regarding whether (1) African-American voters, in coalescing with other voters, had an ability to elect the candidate of their choice in benchmark CD 25,[100] (2) assuming that they did, whether such ability would be protected under § 5, and (3) assuming it would, whether there was in fact retrogression in the enacted map.[101] The

---

[99] The State previously characterized CD 25 as a crossover district. Docket no. 457 at 19 ("CD 25 is a crossover district") and n.9 (defining a crossover district as "a district in which African-Americans or Latinos make up less than 50% of voters but can usually elect their candidates of choice with reliable crossover voting by members of the Anglo majority")).However, the State now contends that benchmark CD 25 was not a crossover district.

[100] The Intervenors' experts have opined that CD 25 should be counted as a minority ability district because it is a district in which minority voters have the ability to elect candidates of their choice to Congress. Rebuttal Report of S. Ansolabehere at 5, 15 (D.C. docket no. 155; D.C. Trial Exh. 724)(CD 25 is a district in which minorities have the ability to elect their preferred candidates and it must be included in an analysis of retrogression); Supp. Expert Report of A. Lichtman at 6, ¶ 10 (D.C. docket no. 152 and D.C. Trial Exh. 372)("There is an additional district in C100 that should also be counted as a district that provides minority voters the ability to elect candidates of their choice to Congress. That is Congressional District 25, in Travis County.").

[101] See Rebuttal Report of S. Ansolabehere at 6, D.C. docket no. 155; D.C. Trial Exh. 724)("Plan C185 dismantles CD 25. The result of this dismantling and changes in other district boundaries is to reduce the number of Congressional Districts in which Blacks and Hispanics have the ability to elect their preferred candidates from 11

Court is unable to predetermine how the D.C. Court may ultimately resolve these difficult issues. In the interim, however, C235 makes changes to DFW that potentially offset the loss of African American voting strength in CD 25. Thus, the Court concludes that the substantial changes to the enacted map that would be required by attempting to preserve benchmark CD 25 are not justified at this time. For purposes of an interim plan, the Court concludes that C235 adequately addresses the claims relating to the Central Texas districts.

G. CD 27/Nueces County/opportunity districts in South/West Texas

C235 also sufficiently addresses Plaintiffs' claims related to the number of opportunity districts in South/West Texas. Plaintiffs challenge enacted CDs 27 and 34, arguing that the State's decision to move Nueces County from a Latino opportunity district (benchmark CD 27) to a largely Anglo district (enacted CD 27)[102] violates both the Fourteenth Amendment and § 2 by depriving the large Latino population in Nueces County of the ability to elect the candidate of their choice and by "cracking" Latinos such that a new Latino opportunity

---

to 10."). *See* also Supp. Expert Report of A. Lichtman at 9-11 (D.C. docket no. 152; D.C. Trial Exh. 722) ("The new districts comprising fragments of Travis County are all dominated by Anglo Republicans, in which minorities have no ability to elect candidates of their choice. There is no substitute crossover district in the state-passed plan for the dismembered existing CD 25. Thus, the state-passed proposed plan has the effect of retrogressing minority voter opportunities by reducing minority ability to elect districts from 11 of 32 to 10 of 36.").

[102] Benchmark CD 27 was renumbered as CD 34 in the State's enacted plan. The State then inserted a new Congressional District along the central Gulf Coast and numbered it CD 27.

district cannot be drawn in the South and West Texas area.

Plaintiffs argue that Nueces County has historically been part of the South Texas configuration,[103] and that separating the large Hispanic population from South Texas was part of an intentional scheme to diminish the total Hispanic population available for creating minority opportunity districts in South and West Texas. In this regard, some Plaintiffs showed that 7 compact districts could be drawn that included Hispanic Nueces County voters but not Travis County voters,[104] and thus they argue that the Legislature intentionally excluded Nueces County Hispanics as part of its scheme to unnecessarily destroy the CD 25 "tri-ethnic coalition" district. Other Plaintiffs, such as the Latino Redistricting Task Force, argue that the State could have included the Nueces County Hispanics in the South Texas configuration even with the State's enacted version of CD 35. *See* Plan C190. And yet other Plaintiffs contend that, by including Nueces County within South Texas, it is possible to draw 8 (as opposed to 7) Latino opportunity districts in South/Central/West Texas. *See* Plans C188, C211. Thus, Plaintiffs contend, the State's decision to divest Nueces County from South Texas, which had "ripple effects" not

---

[103] The Court notes that from 1968 to 1980, Nueces County was part of a central Gulf Coast district spanning northeast up to and including either Matagorda or Brazoria County. Nueces County first became part of South Texas CD 27 in 1982, where it has remained since that time (though for the 2002 election, the western portion of the county was placed into CD 15).

[104] *See* Plans C123, C163, C164, C201, C208, C214, C218.

only in South/West/Central Texas but also around Harris County, was a violation of § 2 and an act of intentional discrimination against Hispanics.

Although these claims are not without merit, based on the analysis conducted thus far, the Court does not find at this time that Plaintiffs have a likelihood of success on the merits of their claim sufficient to warrant changes to the enacted map for an interim plan.

With regard to the claims that § 2 requires 8 Latino opportunity districts in South/Central/West Texas, the hypothetical plans proposed in support of this assertion fail to satisfy *Gingles* in terms of compactness. In Plans C188 and C211, a proposed district stretches from south Hidalgo County all the way to north Travis County. The Supreme Court has ruled that a nearly identical (and arguably more compact) district in the same location was "noncompact for § 2 purposes." *LULAC*, 548 U.S. at 435. Thus, Plaintiffs do not have a likelihood of success on their § 2 claims premised on the failure to create 8 Latino opportunity districts in South/Central/West Texas.

As noted, several Plaintiffs contend that 7 opportunity districts could have been created that included the Hispanic voters of Nueces County. C235 sufficiently addresses those § 2 claims by restoring CD 23, and thus including 7 Latino opportunity districts in South/Central/West Texas.

Although C235 leaves Nueces County (and thus approximately 200,000 Hispanics who previously were in a Latino opportunity district) in the new Anglo district to the North, the Court finds no basis for altering the enacted map's placement of Nueces County. Even though the Supreme Court has indicated that § 2 rights are

individual rights,[105] the *Shaw* Court noted that "[t]his does not mean that a § 2 plaintiff has the right to be placed in a majority-minority district once a violation of the statute is shown. States retain broad discretion in drawing districts to comply with the mandate of § 2." *Shaw*, 517 U.S. at 917 n.9 (citing *Voinovich v. Quilter*, 507 U.S. 146, 156-157 (1993); *Growe v. Emison*, 507 U.S. 25, 32-37 (1993)). The *Shaw* Court further indicated that, even under a strict scrutiny standard, the Legislature need only "substantially address" the § 2 violation. *Shaw*, 517 U.S. at 918; *see also Bush v. Vera*, 517 U.S. 952, 994 (1996) (O'Connor, J., concurring) ("[I]f a State pursues that compelling interest by creating a district that 'substantially addresses' the potential liability, and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, its districting plan will be deemed narrowly tailored."). Cf. *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) ("Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act . . . .").

Although Plaintiffs contend (and demonstrate) that Nueces County Hispanics could have been included in a South Texas district along with other voters suffering a § 2 violation, they have not established a substantial likelihood of success on their claim that the failure to so

---

[105] In *Shaw v. Hunt*, 517 U.S. 899, 917 (1996), the Supreme Court held that § 2 is an individual right as opposed to a right of a minority group as a whole. Thus, in *Shaw* and *LULAC*, it recognized that the State's creation of an opportunity district for those without a§ 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right. *Id.*; *LULAC v. Perry*, 548 U.S. 399, 430 (2006).

place them was a violation of § 2 or the Fourteenth Amendment. The failure to place Nueces County Hispanics in a South Texas district has not diminished Hispanic voter opportunity for § 2 purposes, since whether they are included or not, it appears that only 7 reasonably compact Latino opportunity districts can be drawn in compliance with § 2. In other words, Plaintiffs fail to demonstrate that their placement prevented them (or other Latinos) from constituting a majority in an additional district. *See Voinovich*, 507 U.S. at 154; *see also id.* at 155 ("§ 2 focuses exclusively on the consequences of apportionment"). With the restoration of CD 23, C235 substantially addresses the § 2 violation while respecting the Legislature's policy decisions concerning the placement of Nueces County. Plaintiffs produce no authority to show that every Hispanic voter who was shown to be within a hypothetical or potential *Gingles* district must be placed into an opportunity district.[106]

---

[106] *LULAC v. Perry* states that while States retain broad discretion in drawing districts to comply with § 2, "[t]he Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others . . ., [and] these conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." 548 U.S. 399, 429 (2006). However, *LULAC* did not involve a situation wherein a State created the required number of minority opportunity districts but failed to include all the voters who demonstrated a § 2 violation within those districts. And, although § 2 may confer individual rights, "plaintiffs can prevail on a dilution claim only if they show that, under the totality of circumstances, the State's apportionment scheme has the effect of diminishing or abridging the

Because C235 creates the required number of § 2 districts and substantially addresses the alleged § 2 violation, Plaintiffs have demonstrated no basis for further changes related to Nueces County.

Nor is the Court able to conclude that Plaintiffs have established a substantial likelihood of success on their claim that the Legislature's decision to exclude Nueces County from a § 2 district was intentionally racially discriminatory. Downton testified that there were "dual goals with 27 and 34" to create a district controlled by Cameron *County* and to create a district for Congressman Farenthold, who lived in Nueces County, to be elected as a Republican. The State elicited testimony that the State House and State Senate representatives from Cameron County (all three Latino Democrats) expressed a desire for a congressional district to be anchored in Cameron County, rather than, as was the case in benchmark CD 27, a district weighted on both ends by the competing ports of Brownsville and Corpus Christi. Further, Gerardo Interiano testified that Nueces County was placed in CD 27 based on a request to be put in a district going north, or at least to be the anchor of a district. Tr. 1461.

In its motion for summary judgment in the § 5 case, Texas argued that CD 27 was overpopulated, and given its location along the Mexico border and the Gulf of Mexico, there were limited options for dealing with the overpopulation.[107] Texas asserted that "Nueces County, in

---

voting strength of the protected class," as opposed to individuals within the class. *Voinovich*, 507 U.S. at 157.

[107] D.C. docket no. 41 at 28.

the northern part of [CD 27], was moved into a district to the north, where the Legislature was able to keep the county contained in a single district." Although that placement may have had a disadvantageous effect on Hispanic populations in other areas (such as Travis County and/or the Houston area), and even if the Legislature was aware of such a disadvantageous effect, Plaintiffs have not demonstrated a likelihood of success on their claim that a racially discriminatory purpose lay behind the decision.

H. Remaining § 2 claims

The Court concludes that C235 adequately addresses Plaintiffs' § 2 claims. To the extent Plaintiffs argue that § 2 requires 7 Latino opportunity districts in South/Central/West Texas, C235 creates them in response to the § 5 claims, and thus this Court need not decide whether § 2 requires 7 Latino opportunity districts. To the extent Plaintiffs base their § 2 claims on the creation of coalition districts, the Court finds that significant legal and factual issues remain unresolved that preclude a finding at this time that Plaintiffs are likely to succeed on the merits of these claims.

Conclusion

The Court has independently reviewed C235 and determined that it complies with the Supreme Court's standards set forth in *Perry v. Perez* and that it is an appropriate interim plan. For the reasons we have explained, we have adopted Plan C235.

SIGNED on this 19th day of March, 2012.

/s/
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

/s/
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

APPENDIX E

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ADVISORY

This Court recognizes the effect of the temporary stay entered by the Circuit Justice, but sees nothing in the order that would prohibit the parties from voluntarily exchanging their proposed remedial maps, conferring, and attempting to reach an agreement or understanding on certain aspects of the remedial maps so that in the event the stay is vacated by the Supreme Court this matter may be resumed expeditiously.

SIGNED this 28th day of August, 2017,

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX F

U.S. Constitution Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress,

or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

52 U.S.C. § 10301

§ 10301. Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

APPENDIX G

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 8, 2013

The Honorable Joe Straus
Speaker, Texas House of Representatives
Post Office Box 2910
Austin, TX 78768

Dear Speaker Straus:

When the Supreme Court issues its ruling in *Shelby County v. Holder*, the Texas redistricting case will return to the San Antonio court for further legal proceedings. The best way to avoid further intervention from federal judges in the Texas redistricting plans, and ensure an orderly election without further delay or uncertainty, is to enact the interim maps during the regular session. These maps already have the approval from the federal judges overseeing this litigation. Enacting the interim plans into law would confirm the legislature's intent for a redistricting plan that fully comports with the law, and will insulate the State's redistricting plans from further legal challenge.

POST OFFICE BOX 12548, AUSTIN, TEXAS 78711-2548
TEL:(512)463-2100 WWW.OAG.STATE.TX.US
An Equal Employment Opportunity Employer · Printed on Recycled Paper

Sincerely,

Greg Abbott
Attorney General of Texas

GA:ra

POST OFFICE BOX 12548, AUSTIN, TEXAS 78711-2548
TEL:(512)463-2100 WWW.OAG.STATE.TX.US
An Equal Employment Opportunity Employer · Printed on Recycled Paper

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 18, 2013

The Honorable Kel Seliger
Texas Senate
Post Office Box 12068
Austin, Texas 78711

The Honorable Drew Darby
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768

Dear Senator Seliger and Representative Darby:

You recently received a letter from Jose Garza, the Mexican-American Legislative Caucus's redistricting counsel, concerning pending legislative proposals to adopt the 2012 court-ordered interim redistricting plans as the State's permanent redistricting maps. Mr. Garza's letter contains multiple statements and misrepresentations that do not merit a response. But to prevent you from being misled, I will provide you more information about a few of the issues raised by Mr. Garza.

First, Mr. Garza notes that federal judges in Washington, D.C. have ruled that two of the redistricting plans adopted by the Legislature were created "with a discriminatory purpose." Indeed, they did. In fact, the D.C. court concluded that all three maps were tainted by evidence of discriminatory purpose. That is exactly why you should take action. The Legislature has both the opportunity and the obligation to remove that specter of discrimination. That is why I have been counseling leadership that the best way to remedy the violations found by the D.C. court is to adopt the court-drawn interim plans as the State's permanent redistricting maps.

Evidently Mr. Garza believes that the interim maps crafted by three federal judges are burdened by discriminatory purpose or other violations of the Voting Rights Act. The interim maps were not drawn by or voted on by the Texas Legislature. I don't believe — as Mr. Garza does — that the federal judges ordered the 2012 elections to proceed under maps that incorporated racial discrimination. And indeed, the interim maps remedy every legal violation found by the D.C. court.

Mr. Garza faults my proposed resolution to the protracted and contentious redistricting litigation, calling it an "end- run around the judicial process on redistricting." If he is accusing me of attempting to avoid further litigation, I confess.

Far from being an "end-run around the judicial process," my proposed solution recognizes that the Constitution gives to states the prerogative – and primary responsibility – for redistricting. The Supreme Court has repeatedly emphasized that redistricting is first and primarily a legislative function belonging to the states. *See, e.g., LULAC v Perry,* 548 US 399, 414-15 (2006). The Texas Legislature – not a federal court – should have the ultimate word on the State's redistricting maps. You should reject Mr. Garza's solicitation to abdicate Texas' sovereign responsibility. You should not cede to federal courts a responsibility that is first and foremost yours. At this moment, you have control. After the session, you lose control.

Mr. Garza also states that enacting the interim plans would occur "without meaningful input from the minority community." That is wrong. Mr. Garza ignores the fact that the interim maps were drawn with the input and approval of a significant number of the minority groups challenging the State's redistricting maps – even if he himself held out for more. You should also know that Mr. Garza and MALC participated in the interim map-drawing process by submitting their own proposed interim plans – they were rejected by the federal court. Moreover, any legislative approval of the interim plans should – and will – be done through the normal legislative process, which will include full public notice and hearing for the very purpose of gaining "meaningful input" from all Texans, including the minority community.

He also suggests that passing the interim maps will inject additional delay and confusion into the election process. To the contrary, the interim maps have already met with the approval of the federal judges overseeing the redistricting litigation and are the very same maps that Texans voted under during the 2012 election cycle. On the other hand, MALC's proposed interim plans, which if made permanent would significantly alter current legislative districts, have already been rejected by the federal judges who crafted the interim plans. If MALC continues to push for overreaching alterations to the maps the only certainty is prolonged litigation.

Contrary to Mr. Garza's suggestion, the surest way to ensure continuous redistricting litigation and inject further delay is for you to do nothing. If you fail to pass the interim maps, it will likely take several years to resolve the current redistricting litigation (and ensuing appeals), ensuring that Texas' elections will for years to come be mired in confusion or delay or both. As I stated in my March 8 letter to House Speaker Joe Straus, the best way to decrease voter confusion and to end unnecessary litigation would be to enact legislation that makes the 2012 interim plans drawn by the San Antonio district court the State's permanent redistricting maps.

Sincerely,

Greg Abbott
Attorney General of Texas

POST OFFICE BOX 12548, AUSTIN, TEXAS 78711-2548
TEL:(512)463-2100 WWW.OAG.STATE.TX.US
An Equal Employment Opportunity Employer · Printed on Recycled Paper

cc: Lieutenant Governor David Dewhurst
Speaker Joe Straus
Senator Rodney Ellis
Senator Sylvia Garcia

Senator Juan "Chuy" Hinojosa
Senator Eddie Lucio, Jr.
Senator Jose Rodriguez
Senator Carlos Uresti
Senator Leticia Van de Putte
Senator Royce West
Senator Judith Zaffirini
Senator Joan Huffman
Senator Kirk Watson
Senator Robert Duncan
Representative Todd Hunter
Representative Yvonne Davis
Representative Brandon Creighton
Representative Jim Keffer
Representative Rene Oliveira
Representative Joe Pickett
Representative Senfronia Thompson
Representative Sylvester Turner
Representative Larry Gonzales
Representative Trey Martinez Fischer

APPENDIX H

Testimony of Nina Perales
Vice President of Litigation, MALDEF
House Select Committee on Redistricting
Friday, May 31, 2013
Austin, Texas

Chairman Darby and Members of the House Select Committee, my name is Nina Perales and I am Vice President of Litigation for MALDEF, the Mexican American Legal Defense and Educational Fund. MADEF is a non-profit law firm that protects and promotes the civil rights of Latinos living in the United States.

In the current redistricting cycle, MALDEF represents the Texas Latino Redistricting Task Force, a statewide coalition of non-partisan Latino advocacy organizations that includes the Mexican American Bar Association of Texas, Southwest Voter Registration Education Project, Texas HOPE, the William C. Velasquez Institute, NOMAR and Southwest Worker's Union.

Following the Legislature's enactment of the 2011 redistricting plans for Congress and Texas House, the Texas Latino Redistricting Task Force filed suit challenging the plans as discriminatory against Latinos in violation of the Voting Rights Act and the U.S. Constitution. The Texas Latino Redistricting Task Force also intervened to oppose

preclearance of the 2011 enacted plans in the lawsuit filed by Texas in Washington DC federal court.

In both cases, the Texas Latino Redistricting Task Force presented the bulk of the evidence and argument related to discrimination against Latino voters, including extensive analysis of the maps and expert witness testimony regarding Texas demographics, polarized voting and the history of election practices affecting minority voters.

As a result of these efforts, I am proud to say that the Texas Latino Redistricting Task Force was able to persuade the federal court in San Antonio that its interim plans for the 2012 elections should include substantial changes to alleviate discrimination against Latino voters in the 2011 enacted maps. Our evidence was also strong enough to convince the Texas Attorney General that these changes needed to be made.

The interim maps ordered by the court significantly improve Latino political strength:

Congressional Plan

West Texas: The court's interim plan restored CD 23 to benchmark levels and noted that the restoration addressed the claims that the Voting Rights Act required the creation of 7 Latino opportunity districts in South Texas. WDTX, C235, p. 32. This restoration in the interim maps addresses the intentional discrimination findings by the DDC on CD 23. DDC Op., p. 32-33; DDC Op., p. 108-113.

Dallas Ft.-Worth: The court's interim plan remedies the fracturing of minority voters in DFW that the court found raised claims that the boundaries were the product of intentional racial discrimination. WDTX, C235, p. 36. This change remedies the finding of intentional racial discrimination by the DDC. DDC Op., p. 125.

Existing Minority Congressional Districts: The court's interim plan made changes to ensure that African American and Latino incumbents had their homes and district offices located in the districts that they represent. WDTX, C235, p. 41. The DDC found intentional racial discrimination in the creation of those districts. DDC Op., p. 38-40.

Retrogression Congress: The court's interim plan cures the representation gap by restoring CD 23 and creating CD 33. The DDC concluded that the congressional map should contain 11 minority ability to elect districts to avoid retrogression. The court's interim plan contains 12 minority ability to elect districts.

House Plan

Rio Grande Valley (HD 35): The court's interim plan creates a new Latin-majority district in the Rio Grande Valley to provide representation to the fast-growing population in that region. WDTX Op., H309, p. 5.

Hidalgo County (HD 41): The court's interim plan restored HD 41 after identifying serious concerns related to population deviation under *Larios v. Cox*. WDTX Op., H309, p. 4.

El Paso (HD 78): The court's interim plan restored HD 78 after recognizing the plaintiffs claim of racial gerrymandering of Latinos. WDTX Op., H309, p. 10-11.

Bexar County (HD 117): The court's interim plan restored HD 117 to address claims that the boundaries of the district purposefully discriminated against Latino voters. WDTX Op., H309, p. 6. The DDC also found that the "evidence [regarding HD 117] may support a finding of discriminatory purpose in enacting the State House Plan." DDC Op., p. 71.

Harris County (HD 144): The court's interim plan creates a new Latino-majority district (HD 144) in Harris County after finding that "the plaintiffs have demonstrated a likelihood of success on the merits of their Section 2 claim[.]" WDTX Op., H309, p. 8-9.

Harris County (HD 149): The court's interim plan restored HD 149 which is tri-racial coalition district. WDTX Op., H309, p. 10. The DDC found that "Benchmark HD 149 is a protected ability district, and Texas's decision to dismantle it without offsetting the loss elsewhere is retrogressive." DDC Op., p. 66.

House Retrogression: The court's interim plan restored enough districts to address the DDC finding of retrogression. The DDC found a loss of four ability districts — HDs 33, 35, 117, and 149." The Court's interim plan replaced or restored all four districts. In addition, the court's interim plan revised the boundaries of HD 78 so that it would offer the opportunity to elect the Latino-preferred candidate.

Overall, the court's interim House plan created three more Latino opportunity House districts when compared to the Legislature's 2011 plan.

In conclusion, the Texas Latino Redistricting Task Force did not draw the interim maps, and the maps are not perfect. From a legislative and policy perspective there is room for improvement. There are also additional parties in the lawsuit with different claims and they should have the opportunity to present their perspective on the interim plans.

Most importantly, we do not want to go backwards from the interim maps and see the Legislature subtract from the Latino opportunity that we have gained through our hard-fought efforts in court. Thank you for the opportunity to testify today.